Reconsideration of Prior Statement of Decision
04-RL 3929-05
Supporting Documentation

1. Statutes 1980, chapter 1143
2. *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875
3. *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986
4. *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96
5. *California State Restaurant Asssn. v. Whitlow* (1976) 58 Cal.App.3d 340
6. *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100
7. 65 Opinions of the California Attorney General 618, 623 (1982)
8. *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24
9. *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563
10. *People v. Harrison* (1989) 48 Cal.3d 321
11. *People v. Mendoza* (2000) 23 Cal.4th 896
12. *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809

SEC. 3. This act shall become operative July 1, 1981.

CHAPTER 1143

An act to amend Section 65302 of, and to add Article 10.6 (commencing with Section 65580) to Chapter 3 of Division 1 of Title 7 of the Government Code relating to local planning.

[Approved by Governor September 26, 1980 Filed with Secretary of State September 26, 1980.]

The people of the State of California do enact as follows:

SECTION 1. The Department of Housing and Community Development shall within 30 days after the effective date of this section prepare and send to each county and city a questionnaire requesting the following information:

(1) The number of mobilehome parks within the jurisdiction, and the authorized number of mobilehome sites in each park.

(2) The number of requests or permit applications for change of use of the mobilehome park.

(3) The number of applications for the establishment of new mobilehome parks.

(4) The disposition of requests or permit applications for change of use of mobilehome parks or applications for the establishment of new mobilehome parks and the reasons for denial of such requests or applications.

(5) The availability of land within the jurisdiction that may be appropriate for establishment of mobilehome parks.

(6) Local established practices, policies, and ordinances concerning change of use of mobilehome parks.

(7) Local efforts and policies for reducing the incidence of change of use of mobilehome parks within the jurisdiction.

The information specified in paragraphs (1) to (4), inclusive, shall cover the period from January 1, 1979, through December 31, 1979. The information specified in paragraphs (5) to (7), inclusive, shall reflect current conditions and circumstances as of the time of the completion of the questionnaire.

The department shall prepare and submit a written report to the Legislature on or before July 1, 1981, containing an evaluation of the information received in response to the questionnaire.

This section shall apply to charter cities and counties as well as general law cities and counties.

SEC. 2. Section 65302 of the Government Code is amended to read:

65302. The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan

proposals. The plan shall include the following elements:

(a) A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan. The land use element shall also identify areas covered by the plan which are subject to flooding and shall be reviewed annually with respect to such areas.

(b) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities, all correlated with the land use element of the plan.

(c) A housing element as provided in Article 10.6 (commencing with Section 65580).

(d) A conservation element for the conservation, development, and utilization of natural resources including water and its hydraulic force, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources. That portion of the conservation element including waters shall be developed in coordination with any countywide water agency and with all district and city agencies which have developed, served, controlled or conserved water for any purpose for the county or city for which the plan is prepared. The conservation element may also cover:

(1) The reclamation of land and waters.

(2) Flood control.

(3) Prevention and control of the pollution of streams and other waters.

(4) Regulation of the use of land in stream channels and other areas required for the accomplishment of the conservation plan.

(5) Prevention, control, and correction of the erosion of soils, beaches, and shores.

(6) Protection of watersheds.

(7) The location, quantity and quality of the rock, sand and gravel resources.

The conservation element shall be prepared and adopted no later than December 31, 1973.

(e) An open-space element as provided in Article 10.5 (commencing with Section 65560) of this chapter.

(f) A seismic safety element consisting of an identification and appraisal of seismic hazards such as susceptibility to surface ruptures from faulting, to ground shaking, to ground failures, or to effects of seismically induced waves such as tsunamis and seiches.

The seismic safety element shall also include an appraisal of mudslides, landslides, and slope stability as necessary geologic

hazards that must be considered simultaneously with other hazards such as possible surface ruptures from faulting, ground shaking, ground failure and seismically induced waves.

To the extent that a county's seismic safety element is sufficiently detailed containing appropriate policies and programs for adoption by a city, a city may adopt that portion of the county's seismic safety element that pertains to the city planning area within the county's jurisdiction, in satisfaction of this subdivision.

In adopting a county seismic safety element, a city shall follow all requirements regarding the content and adoption of general plan elements as set forth in this article and Article 6 (commencing with Section 65350) of this chapter.

Each county and city shall submit to the Division of Mines and Geology of the Department of Conservation one copy of the seismic safety element and any technical studies used for developing the seismic safety element.

(g) A noise element, which shall recognize guidelines adopted by the Office of Noise Control pursuant to Section 46050.1 of the Health and Safety Code, and which quantifies the community noise environment in terms of noise exposure contours for both near- and long-term levels of growth and traffic activity. Such noise exposure information shall become a guideline for use in development of the land use element to achieve noise compatible land use and also to provide baseline levels and noise source identification for local noise ordinance enforcement.

The sources of environmental noise considered in this analysis shall include, but are not limited to, the following:

(1) Highways and freeways.

(2) Primary arterials and major local streets.

(3) Passenger and freight on-line railroad operations and ground rapid transit systems.

(4) Commercial, general aviation, heliport, helistop, and military airport operations, aircraft overflights, jet engine test stands, and all other ground facilities and maintenance functions related to airport operation.

(5) Local industrial plants, including, but not limited to, railroad classification yards.

(6) Other ground stationary noise sources identified by local agencies as contributing to the community noise environment.

The noise exposure information shall be presented in terms of noise contours expressed in community noise equivalent level (CNEL) or day-night average level (L_{dn}). CNEL means the average equivalent A-weighted sound level during a 24-hour day, obtained after addition of five decibels to sound levels in the evening from 7 p.m. to 10 p.m. and after addition of 10 decibels to sound levels in the night before 7 a.m. and after 10 p.m. L_{dn} means the average equivalent A-weighted sound level during a 24-hour day, obtained after addition of 10 decibels to sound levels in the night before 7 a.m. and after 10 p.m.

The contours shall be shown in minimum increments of 5db and shall continue down to 60db. For areas deemed noise sensitive, including, but not limited to, areas containing schools, hospitals, rest homes, long-term medical or mental care facilities, or any other land-use areas deemed noise sensitive by the local jurisdiction, the noise exposure shall be determined by monitoring.

A part of the noise element shall also include the preparation of a community noise exposure inventory, current and projected, which identifies the number of persons exposed to various levels of noise throughout the community.

The noise element shall also recommend mitigating measures and possible solutions to existing and foreseeable noise problems.

The state, local, or private agency responsible for the construction, maintenance, or operation of those transportation, industrial, or other commercial facilities specified in paragraph 2 of this subdivision shall provide to the local agency producing the general plan, specific data relating to current and projected levels of activity and a detailed methodology for the development of noise contours given this supplied data, or they shall provide noise contours as specified in the foregoing statements.

It shall be the responsibility of the local agency preparing the general plan to specify the manner in which the noise element will be integrated into the city or county's zoning plan and tied to the land use and circulation elements and to the local noise ordinance. The noise element, once adopted, shall also become the guideline for determining compliance with the state's noise insulation standards, as contained in Section 1092 of Title 25 of the California Administrative Code.

(h) A scenic highway element for the development, establishment, and protection of scenic highways pursuant to the provisions of Article 2.5 (commencing with Section 260) of Chapter 2 of Division 1 of the Streets and Highways Code.

(i) A safety element for the protection of the community from fires and geologic hazards including features necessary for such protection as evacuation routes, peak load water supply requirements, minimum road widths, clearances around structures, and geologic hazard mapping in areas of known geologic hazards.

The requirements of this section shall apply to charter cities.

SEC. 3. Article 10.6 (commencing with Section 65580) is added to Chapter 3 of Division 1 of Title 7 of the Government Code, to read:

Article 10.6. Housing Elements

65580. The Legislature finds and declares as follows:

(a) The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.

(b) The early attainment of this goal requires the cooperative

participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels.

(c) The provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government.

(d) Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.

(e) The Legislature recognizes that in carrying out this responsibility, each local government also has the responsibility to consider economic, environmental, and fiscal factors and community goals set forth in the general plan and to cooperate with other local governments and the state in addressing regional housing needs.

65581. It is the intent of the Legislature in enacting this article:

(a) To assure that counties and cities recognize their responsibilities in contributing to the attainment of the state housing goal.

(b) To assure that counties and cities will prepare and implement housing elements which, along with federal and state programs, will move toward attainment of the state housing goal.

(c) To recognize that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs.

(d) To ensure that each local government cooperates with other local governments in order to address regional housing needs.

65582. As used in this article:

(a) "Community," "locality," "local government," or "jurisdiction" means a city, city and county, or county.

(b) "Department" means the Department of Housing and Community Development.

(c) "Housing element" or "element" means the housing element of the community's general plan, as required pursuant to this article and subdivision (c) of Section 65302.

65583. The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, and shall make adequate provision for the existing and projected needs of all economic segments of the community. The element shall contain all of the following:

(a) An assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs. The assessment and inventory shall include the following:

(1) Analysis of population and employment trends and

documentation of projections and a quantification of the locality's existing and projected housing needs for all income levels. Such existing and projected needs shall include the locality's share of the regional housing need in accordance with Section 65584.

(2) Analysis and documentation of household characteristics, including level of payment compared to ability to pay, housing characteristics, including overcrowding, and housing stock condition.

(3) An inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites.

(4) Analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels, including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, and local processing and permit procedures.

(5) Analysis of potential and actual nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the availability of financing, the price of land, and the cost of construction.

(6) Analysis of any special housing needs, such as those of the handicapped, elderly, large families, farmworkers, and families with female heads of households.

(7) Analysis of opportunities for energy conservation with respect to residential development.

(b) A statement of the community's goals, quantified objectives, and policies relative to the maintenance, improvement, and development of housing.

It is recognized that the total housing needs identified pursuant to subdivision (a) may exceed available resources and the community's ability to satisfy this need within the content of the general plan requirements outlined in Article 5 (commencing with Section 65300). Under these circumstances, the quantified objectives need not be identical to the identified existing housing needs, but should establish the maximum number of housing units that can be constructed, rehabilitated, and conserved over a five-year time frame.

(c) A program which sets forth a five-year schedule of actions the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, provision of regulatory concessions and incentives, and the utilitzation of appropriate federal and state financing and subsidy programs when available. In order to make adequate provision for the housing needs of all economic segments of the community, the program shall do all of the following:

(1) Identify adequate sites which will be made available through appropriate zoning and development standards and with public

services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including rental housing, factory-built housing and mobilehomes, in order to meet the community's housing goals as identified in subdivision (b).

(2) Assist in the development of adequate housing to meet the needs of low- and moderate-income households.

(3) Address and, where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing.

(4) Conserve and improve the condition of the existing affordable housing stock.

(5) Promote housing opportunities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, or color.

The program shall include an identification of the agencies and officials responsible for the implementation of the various actions and the means by which consistency will be achieved with other general plan elements and community goals. The local government shall make a diligent effort to achieve public participation of all economic segments of the community in the development of the housing element, and the program shall describe this effort.

65584. (a) For purposes of subdivision (a) of Section 65583, a locality's share of the regional housing needs includes that share of the housing need of persons at all income levels within the area significantly affected by a jurisdiction's general plan. The distribution of regional housing needs shall, based upon available data, take into consideration market demand for housing, employment opportunities, the availability of suitable sites and public facilities, commuting patterns, type and tenure of housing need, and the housing needs of farmworkers. The distribution shall seek to avoid further impaction of localities with relatively high proportions of lower income households. Based upon data provided by the Department of Housing and Community Development relative to the statewide need for housing, each council of governments shall determine the existing and projected housing need for its region. The Department of Housing and Community Development shall ensure that this determination is consistent with the statewide housing need and may revise the determination of the council of governments if necessary to obtain this consistency. Each locality's share shall be determined by the appropriate council of governments consistent with the criteria above with the advice of the department subject to the procedure established pursuant to subdivision (c).

(b) For areas with no council of governments, the Department of Housing and Community Development shall determine housing market areas and define the regional housing need for localities within these areas. Where the department determines that a local government possesses the capability and resources and has agreed to accept the responsibility, with respect to its jurisdiction, for the

identification and determination of housing market areas and regional housing needs, the department shall delegate this responsibility to the local governments within these areas.

(c) Within 90 days following a determination of a council of governments pursuant to subdivision (a), or the department's determination pursuant to subdivision (b), a local government may revise the definition of its share of the regional housing need. The revised share shall be based upon available data and accepted planning methodology, and supported by adequate documentation. Within 60 days of the local government's revision, the council of governments or the department, as the case may be, shall accept the revision or shall indicate, based upon available data and accepted planning methodology, why the revision is inconsistent with the regional housing need. The housing element shall contain an analysis of the factors and circumstances, with all supporting data, justifying the revision. All materials and data used to justify any revision shall be made available upon request by any interested party within 45 days upon payment of reasonable costs of reproduction unless such costs are waived due to economic hardship.

(d) Any authority to review and revise a local government's share of the regional housing need granted under this section shall not constitute authority to revise, approve, or disapprove the manner in which the local government's share of the regional housing need is implemented through its housing program.

65585. (a) Each city, county, and city and county shall consider the guidelines adopted by the Department of Housing and Community Development pursuant to Section 50459 of the Health and Safety Code in preparation and amendment of the housing element pursuant to this article. Such guidelines shall be advisory to each local government in order to assist it in the preparation of its housing element.

(b) At least 90 days prior to adoption of the housing element pursuant to this article and Section 65357, or at least 45 days prior to the adoption of an amendment to this element, the planning agency of a city, county, or city and county shall submit a draft of the element or amendment to the Department of Housing and Community Development. The department shall review drafts submitted to it and report its findings to the planning agency within 90 days of receipt of the draft in the case of adoption of the housing element pursuant to this article, or within 45 days of receipt of the draft in the case of an amendment. The legislative body shall consider the department's findings prior to final adoption of the housing element or amendment.

(c) Each local government shall provide the department with a copy of its adopted housing element or amendments. The department may review adopted housing elements or amendments and report its findings.

(d) Except as provided in Section 65586, any and all findings made by the Department of Housing and Community Development

pursuant to subdivisions (b) and (c) shall be advisory to the local government.

65586. Local governments shall conform their housing elements to the provisions of this article on or before October 1, 1981. Jurisdictions with housing elements adopted before October 1, 1981, in conformity with the housing element guidelines adopted by the Department of Housing and Community Development on December 7, 1977, and located in Subchapter 3 (commencing with Section 6300) of Chapter 6 of Part 1 of Title 25 of the California Administrative Code, shall be deemed in compliance with this article as of its effective date. A locality with a housing element found to be adequate by the department before October 1, 1981, shall be deemed in conformity with these guidelines.

65587. (a) Each city, county, or city and county shall bring its housing element, as required by subdivision (c) of Section 65302, into conformity with the requirements of this article on or before October 1, 1981. No extension of time for such purpose may be granted pursuant to Section 65302.6, notwithstanding its provisions to the contrary.

(b) Any action brought by any interested party to review the conformity with the provisions of this article of any housing element or portion thereof or revision thereto shall be brought pursuant to Section 1085 of the Code of Civil Procedure; the court's review of compliance with the provisions of this article shall extend to whether the housing element or portion thereof or revision thereto reasonably complies with the requirements of this article.

65588. (a) Each local government shall review its housing element as frequently as appropriate to evaluate all of the following:

(1) The appropriateness of the housing goals, objectives, and policies in contributing to the attainment of the state housing goal.

(2) The effectiveness of the housing element in attainment of the community's housing goals and objectives.

(3) The progress of the city, county, or city and county in implementation of the housing element.

(b) The housing element shall be revised as appropriate, but not less than every five years, to reflect the results of this periodic review, except that the first such revision shall be accomplished by July 1, 1984.

65589. (a) Nothing in this article shall require a city, county, or city and county to do any of the following:

(1) Expend local revenues for the construction of housing, housing subsidies, or land acquisition.

(2) Disapprove any residential development which is consistent with the general plan.

(b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

(c) Nothing in this article shall be construed to be a grant of

authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.

(d) The provisions of this article shall be construed consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians.

SEC. 4. Notwithstanding Section 2231 or 2234 of the Revenue and Taxation Code and Section 6 of Article XIII B of the California Constitution, no appropriation is made by this act pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

SEC. 5. Section 2 of this act shall become operative October 1, 1981.

CHAPTER 1144

An act to add Section 669.5 to the Evidence Code, relating to the evidentiary burden of proof.

[Approved by Governor September 26, 1980. Filed with Secretary of State September 26, 1980]

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that an adequate supply of housing is necessary for the health, safety, and public welfare of all Californians. The Legislature further finds and declares that local government ordinances which severely restrict the number of housing units which may be constructed have an effect on the supply of housing within the region, may exacerbate the housing market conditions in surrounding jurisdictions, and may limit access to affordable housing within the jurisdiction and in the region. While the Legislature recognizes that, in certain instances, the public health, safety, and welfare warrant enactment of such ordinances, increasing public need for adequate housing requires that local governments properly establish the need for such ordinances and balance the need for such ordinances against the need for new housing opportunities.

SEC. 2. Section 669.5 is added to the Evidence Code, to read:

669.5. (a) Any ordinance enacted by the governing body of a city, county, or city and county which directly limits, by number, (1) the building permits that may be issued for residential construction or (2) the buildable lots which may be developed for residential purposes, is presumed to have an impact on the supply of residential units available in an area which includes territory outside

170 Cal.Rptr. 342
113 Cal.App.3d 875, 170 Cal.Rptr. 342
(Cite as: 113 Cal.App.3d 875, 170 Cal.Rptr. 342)

C

Court of Appeal, Second District, Division 2, California.

Charles **BOWNDS**, etc., Petitioners and Appellants,
v.
CITY OF **GLENDALE**, etc., Respondents;
STEVENSON-DILBECK DEVELOPMENT CO., Glenluca Properties, Jensen Builders, Hillwood Development, Gustav Kuhn, Erna Kuhn, Real Estate Dynamics, Inc., Sinclair Properties Ltd., The State Department of Housing and Community Development, Real Parties in Interest.

Civ. 58910.

Dec. 23, 1980.
Rehearing Denied Jan. 9, 1981.
Hearing Denied March 11, 1981.

Proceedings were instituted in mandamus to compel the city council to vacate and set aside all approvals for the conversion of existing apartment houses to condominium ownership. The Superior Court, Los Angeles County, Charles H. Phillips, J., entered judgment denying petition for mandate, and petitioner appealed. The Court of Appeal, Compton, J., held that housing element of master plan of City of Glendale contained an extremely comprehensive analysis of present housing inventory and future need and, given fact that overall plan and its ordinances in area of land use regulation represented an honest and reasonable effort to comply with state's statutory requirements, was not inadequate for failure to discuss in specific terms subject of condominium conversion notwithstanding whether it comported with guidelines of Department of Housing and Community Development promulgated pursuant to state planning and zoning law.

Affirmed.

West Headnotes

[1] Zoning and Planning ⚿3
414k3 Most Cited Cases
Thrust of statutory scheme embodied in state planning and zoning law is to insure that decisions made by local governmental entities, which affect future growth of their communities, will be the result of considered judgment in which due consideration is given to the various interrelated elements of community life; however, local control is at the heart of the process. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[2] Zoning and Planning ⚿672
414k672 Most Cited Cases

[2] Zoning and Planning ⚿681
414k681 Most Cited Cases
Actions of a city with respect to zoning and planning are presumed to be valid and in regular performance of its official duty and burden is on objectant to demonstrate that city has failed to perform a specific duty mandated by law. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[3] Zoning and Planning ⚿602
414k602 Most Cited Cases
While a court may conclude that in form and general content, a local zoning plan fails to meet general requirements of statute, a court cannot and should not involve itself in a detailed analysis of whether elements of plan are adequate to achieve its purpose. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[4] Zoning and Planning ⚿721
414k721 Most Cited Cases
In absence of more specific legislation, it would ill-behoove any court to indirectly mandate a specific "action" program under guise of declaring an otherwise complete and comprehensive building and zoning plan to be inadequate, basing its decision on nothing more than a subjective interpretation of nonspecific language. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c),

65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[5] Zoning and Planning 29.5

414k29.5 Most Cited Cases

Housing element of master plan of City of Glendale contained an extremely comprehensive analysis of present housing inventory and future needs and, given fact that overall plan and its ordinances in area of land use regulation represented an honest and reasonable effort to comply with state's statutory requirements, was not inadequate for failure to discuss in specific terms subject of condominium conversion notwithstanding whether it comported with guidelines of Department of Housing and Community Development promulgated pursuant to state planning and zoning law. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[6] Zoning and Planning 353.1

414k353.1 Most Cited Cases

(Formerly 414k353)

The Department of Housing and Community Development has no authority on its own to compel compliance with funding guidelines according to its own notion of what constitutes compliance. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[7] Constitutional Law 62(5.1)

92k62(5.1) Most Cited Cases

(Formerly 92k62(5))

In areas of such critical importance and sensitivity as impairing private property rights and mandating the expenditure of public funds, a delegation of legislative authority to an administrative agency to regulate condominium conversion would violate the doctrine of separation of powers and would be invalid. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459; West's Ann.Const. Art. 1, §§ 1, 19.

[8] Zoning and Planning 14

414k14 Most Cited Cases

The decision-making power in area of land use and planning still rests with the local governmental agencies to be exercised within the constraints prescribed by enactments of the state legislature. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[9] Zoning and Planning 672

414k672 Most Cited Cases

When any attack is made upon the exercise of the decision-making power and the adequacy of the general plan within which it is to be exercised, a presumption of validity attaches to the actions of the local governmental agency. West's Ann.Gov.Code, § § 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[10] Zoning and Planning 357

414k357 Most Cited Cases

Guidelines promulgated by the Department of Housing and Community Development pursuant to the state planning and zoning law are not self-executing and do not have the binding effect of law. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[11] Condominium 2

89Ak2 Most Cited Cases

The subject of conversion of condominiums is of such importance to property owners and tenants alike in California that the authority of a local government to regulate in the area should not hinge on subjective interpretation by courts or administrative boards of the vague or general language to be found in the planning and land use law. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[12] Condominium 2

89Ak2 Most Cited Cases

If the Legislature desires to preempt the decision-making power of local governments in the field of regulating condominium conversion, it should specifically say so. West's Ann.Gov.Code, § § 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

***878 **344** Jones & Jones, by Arthur T. Jones, Glendale, for petitioners and appellants.

Frank R. Manzano, City Atty., Peter C. Wright, Asst. City Atty., for respondents.

Melby & Anderson, by Jarrett Anderson, Glendale, for real parties in interest Stevenson-Dilbeck Development Co.

Michael Franchetti, Chief Deputy Atty. Gen., R. H. Connett, Asst. Atty. Gen., Sylvia O. Cano, Deputy Atty. Gen., amicus curiae, for California

Department of Housing and Community Development.

Carlyle W. Hall, Jr., Los Angeles, for amicus curiae, The Sierra Club.

Selvin & Weiner, Beryl Weiner, Los Angeles, for real party in interest, Sinclair Properties, Ltd.

Roger A. Grable, City Atty., City of Irvine, William H. Keiser, Asst. City Atty., Leonard A. Hampel, Rutan & Tucker, Santa Ana, for amicus curiae, City of Irvine and 45 cities joining herein.

Morton C. Devor, Los Angeles, for real parties in interest Gustav Kuhn and Erna Kuhn.

Alan I. White, Philip W. Green, Drummy, Garrett, King & Harrison, Newport Beach, for real parties in interest Daon Corporation.

Allan M. Kassirer, Selvin & Weiner, Los Angeles, for real party in interest.

COMPTON, Associate Justice.

Proceedings in mandamus to compel the City Council of the City of Glendale (City), inter alia, to vacate and set aside all approvals granted subsequent to July 20, 1978, for the conversion of existing apartment houses to condominium ownership and to declare a moratorium on such conversions pending certain actions by the City in the area of planning which, according to petitioner, are required by law. ***879** The State Department of Housing and Community Development (Department) and the Sierra Club have filed amicus curiae briefs in support of petitioner. An amicus brief in support of City and Real Parties in Interest has been filed on behalf of the City of Irvine and 45 other California cities.

Petitioner is a tenant in an apartment building which was approved by City on July 20, 1978, for conversion to condominium ownership. In this action he purports to represent an unincorporated association of tenants who are similarly situated.

The real parties in interest are owners of apartment buildings who, subsequent to July 20, 1978, have applied for and received approval for conversion to condominiums. The trial court entered judgment denying the petition for mandate. Petitioner has appealed. We affirm.

Code of Civil Procedure section 1085 provides that a writ of mandate may be issued to compel a public official to perform an act which the law specifically requires him to perform. Petitioner contends that City is required by law and should be mandated to perfect what he describes as an "inadequate" general plan and that the failure to take such action renders the City powerless to approve condominium conversions. Hence, according to petitioner, such previously granted approvals must be vacated.

While the immediate goal of petitioner is to prevent the accomplishment of a number of specific condominium conversion projects, the fundamental issue involved is the decision-making power in the area of land use and planning.

Land use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, Article XI, section 7. [FN1] The exercise of that power ****345** has traditionally been accomplished through zoning ordinances and regulation of subdivisions under the State Map Act (formerly Business and Professions Code, section 11500, et seq., now Government Code sections 66410 through 66499.30).

> FN1. California Constitution, Article XI, section 7 provides:
> "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

***880** In recent years the Legislature has enacted a number of statutes as part of the State Planning & Zoning Law, (Gov.Code, s 6500, et seq.) the combined effect of which is to require that cities and counties adopt a general plan for the future development, configuration and character of the city or county and require that future land use decisions be made in harmony with that general plan.

The general plan is required to contain elements dealing with specific areas such as housing, land use and circulation. (Gov.Code, s 65302.) Subdivision

map approval and zoning decisions must be consistent with the general plan. (Gov.Code, ss 66473.5, 66479 and 65860.)

The Department is authorized to develop and publish guidelines for the preparation of the housing element of the plan (Gov.Code, s 65040.2; Health & Saf.Code, s 50459) and the Office of Planning and Research is authorized to do the same for other elements of the plan (Gov.Code, s 65040.2). The Department's guidelines were promulgated in 1973 and codified in California Administrative Code sections 6300 through 6350.

Except for mandating the development of a plan, specifying the elements to be included in the plan, and imposing on the cities and counties the general requirement that land use decisions be guided by that plan, the Legislature has not preempted the decision making power of local legislative bodies as to the specific contours of the general plan or actions taken thereunder.

As we will discuss, petitioner's contentions in this case, as supported by amicus curiae, if accepted, would result in that decision making power being usurped by the Department or the courts.

These contentions are that the guidelines promulgated by the Department are binding on local governments and have the force of law and that the courts should assume the role of determining the "adequacy" with which a local plan addresses all of the various societal factors.

[1] The thrust of the statutory scheme embodied in the state planning and zoning law is to insure that decisions made by local governmental entities, which affect future growth of their communities, will be the result of considered judgment in which due consideration is given to the various interrelated elements of community life. The statutes make clear, however, that local control is at the heart of process.

***881** Government Code section 65030.1 provides in part:

"The Legislature also finds that decisions involving the future growth of the state, most of which are made and will continue to be made at the local level, should be guided by an effective planning process, including the local general plan, and should proceed within the framework of officially approved statewide goals and policies to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors." (Emphasis added.)

Government Code section 66411 provides in part:

"Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall by ordinance, regulate and control subdivisions for which this division requires a tentative and final or parcel map " (Emphasis added.)

The general plan which a city or county is required to adopt is simply a statement of policy. A general plan or policy, whether it be adopted by governmental entity or private ****346** organization serves to provide a standing consistent answer to recurring questions and to act as a guide for specific plans or programs. (O'Loane v. O'Rourke, 231 Cal.App.2d 774, 42 Cal.Rptr. 283.)

Here the City has adopted a master plan and the housing element, which became mandatory by virtue of an amendment to Government Code section 65302, effective January 1, 1972, was completed by mid-1975. That element was undergoing study and revision commencing in early 1978 and a revision was adopted August 1, 1978. The instant action was not commenced until August 21, 1978.

Since 1954, City has also had an ordinance regulating the design and construction of all phases of subdivision development. In December of 1978, it adopted a specific ordinance dealing with condominium development which is applicable to both new development and conversions.

Petitioner's contention is that the City ordinance regulating condominium conversion is invalid and that any approval of such conversions pursuant thereto is void because the housing element of the general plan is "inadequate." The argument goes

that any subdivision regulation, including regulation of condominium conversion, cannot be consistent with the general plan as required by Government Code sections ***882** 66473.5 [FN2] and 66474 [FN3] , if the general plan itself is defective or inadequate.

> FN2. Government Code section 66473.5 reads as follows:
> "No local agency shall approve a map unless the legislative body shall find that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan required by Article 5 (commencing with Section 65300) of Chapter 3 of Division 1 of this title, or any specific plan adopted pursuant to Article 8 (commencing with Section 65450) of Chapter 3 of Division 1 of this title. P A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses and programs specified in such a plan."

> FN3. Government Code section 66474 reads in part as follows:
> "A legislative body of a city or county shall deny approval of a final or tentative * * * map if it makes any of the following findings: (a) That the proposed map is not consistent with applicable general and specific plans. (b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans."

Both petitioner and amicus rely heavily on Save El Toro Assn. v. Days, 74 Cal.App.3d 64, 141 Cal.Rptr. 282. In that case the Court of Appeal invalidated a city's approval of a subdivision map because the court determined that the city had adopted neither a general plan nor a local open space plan. It was there held that a subdivision could not be consistent with a non-existent plan.

Here, there is no question but what the City of Glendale has adopted a general plan with all of the required elements. The claim is simply that, according to petitioner, it is "inadequate" because the housing element of the plan does not discuss in specific terms the subject of condominium conversion and that it does not comport with the Department's guidelines, which, in our opinion, are nothing more than the Department's interpretation of the Legislature's desires. We think it important to note that with one exception neither the statutes themselves nor the guidelines make any specific mention of condominium conversion.

While condominiums, since their recent advent in California, have been treated as subdivisions of airspace and thus subject to the same general type of regulation as traditional land subdivision, it is apparent that conversion of an existing apartment building to condominium ownership does not involve the land use considerations inherent in the traditional land subdivision.

In obvious recognition of this distinction the Legislature has exempted condominium conversions from certain requirements applicable to ***883** other types of subdivisions. Government Code section 66427.2 provides that condominium conversions, which do not include the addition of new units, are not required to be consonant with the general ****347** plan unless that plan contains "definite objectives and policies" relating thereto.

Government Code section 66427, a part of the Subdivision Map Act, exempts condominium projects from a requirement of providing detailed maps of the building being subdivided.

Petitioner and the Department concede that an otherwise adequate general plan need not contain any reference to condominium conversions because such silence implies a finding that conversions pose no obstacle to implementation of the general plan and to require such reference and the procedure that would flow therefrom would be simply a bureaucratic exercise.

What then is the basis for the claim that the City's plan is not otherwise adequate? In short, it is that the City's plan fails to comport with the Department's guidelines which it interprets as requiring an exhaustive inventory of available housing and a "action" program to insure adequate housing for all economic segments of the

community, and which in light of the housing situation in Glendale, must necessarily include reference to the subject of condominium conversions.

The trial court found, on the basis of evidence presented, that the plan, and more specifically the housing element, was adequate and that no special conditions existed which would make it mandatory for the City to include specific provisions concerning condominium conversions. The trial court also found that in each case the approval of the specific conversion project was consistent with the general plan.

[2] The actions of the City are presumed to be valid and a regular performance of official duty. The burden is on petitioner to demonstrate that the City has failed to perform a specific duty mandated by law.

Planning is at best an inexact science. General plans or policy statements are often semantical exercises which require considerable interpretation on the part of persons charged with implementing them.

In the area of planning and land use the Legislature has promulgated its own general policies and mandated that local governments in turn adopt plans which comport with the Legislature's policies.

[3] ***884** Absent a complete failure or at least substantial failure on the part of a local governmental agency to adopt a plan which approximates the Legislature's expressed desires, the courts are ill-equipped to determine whether the language used in a local plan is "adequate" to achieve the broad general goals of the Legislature. In short, while a court, such as in Save El Toro Assn. v. Days, supra, may conclude that in form and general content, a local plan fails to meet the general requirements of the statute, a court cannot and should not involve itself in a detailed analysis of whether the elements of the plan are adequate to achieve its purpose. To do so would involve the court in the writing of the plan. That issue is one for determination by the political process and not by the judicial process.

A perfect example of the problem is presented in this case. Government Code section 65302(c) states in part that the housing element should contain " standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community. Such element shall consider all aspects of current housing technology, to include provisions for not only site-built housing, but also manufactured housing, including mobilehomes and modular homes."

Petitioner and the Department interpret that language as requiring the cities and counties to affirmatively plan in terms of "who, what and when" for the creation of housing. Implicit in this is the requirement of the expenditure of public funds for the purpose. The City contends there is no legislative mandate to affirmatively acquire or produce housing.

[4] In the absence of more specific legislation, it would ill-behoove any court to indirectly mandate such a specific "action" program under the guise of declaring an otherwise complete and comprehensive plan ****348** to be inadequate, basing its decision on nothing more than a subjective interpretation of such non-specific language.

[5] Contrary to the contention of petitioner, we conclude that the housing element of the City's master plan contains an extremely comprehensive analysis of the present housing inventory and future needs. The City's overall plan and its ordinances in the area of land use regulation represent an honest and reasonable effort to comply with the state's statutory requirements.

***885** Finally, we turn to the contention that the guidelines promulgated by the Department have the effect of law, are binding on the cities and counties and thereby limit the legislative prerogative of the city councils and boards of supervisors.

In our opinion, this is a startling concept indeed. As noted earlier, planning guidelines are developed by two bodies under two separate statutory authorizations. Government Code section 65040.2 specifically provides that the guidelines promulgated by the Office of Planning and Research are advisory only.

[6] Health and Safety Code section 50459, which provides for the authority of the Department to promulgate guidelines concerning the housing element in local planning, does not, however, specifically declare such guidelines to be advisory only. The statute does, however, authorize that department to review local housing elements for conformity with Government Code section 65302 and report its findings. The clear implication is that the Department has no authority on its own to compel compliance according to its own notion of what constitutes compliance. The term "guidelines" itself suggests an absence of compulsion.

To carry the argument to its logical extreme, if the Department could promulgate regulations or guidelines having the effect of law it could simply adopt a regulation banning all condominium conversions or spelling out the Department's own regulatory scheme. Further, the Department could, according to its interpretation of the statute, require public funding for housing developments.

[7] In regulating condominium conversion or, in fact, in regulating land use generally, the police power is in direct confrontation with Article I, section 1 of the California Constitution (right to acquire or possess property) and Article I, section 14 (prohibition against the taking of private property without just compensation). In areas of such critical importance and sensitivity as impairing private property rights and mandating the expenditure of public funds, a delegation of legislative authority to an administrative agency would violate the doctrine of separation of powers, Article I, section 14 and would be invalid.

[8][9] In summary, the decision making power in the area of land use and planning still rests with the local governmental agencies to be exercised within the constraints prescribed by enactments of the state ***886** Legislature. When any attack is made upon the exercise of that decision making power and the adequacy of the general plan within which it is to be exercised, a presumption of validity attaches to the actions of the local governmental agency.

[10][11][12] Guidelines promulgated by the Department are not self-executing and do not have the binding effect of law. The subject of conversion of condominiums is of such importance to property owners and tenants alike that the authority of the local government to regulate in the area should not hinge upon subjective interpretation by courts or administrative boards of the vague or general language to be found in the planning and land use law. If the Legislature desires to preempt the decision making power of local governments in the field, it should specifically say so.

Our conclusion is borne out by the fact that since the commencement of this action, the Legislature has enacted AB 2853, which amends Government Code section 65302 and adds Article 10.6 to Chapter 3 of Division 1 of Title 7 of the Government Code.

The effect of this legislation is to codify many of the provisions of the Department's ****349** former guidelines, and to require compliance by October 1, 1981. The new enactment specifically provides that any guidelines or findings adopted by the Department are advisory only, and that judicial review of a local plan be limited to a determination of whether there is "reasonable compliance" with the statutes.

This indicates to us a recognition by the Legislature that the Department's guidelines have always been advisory only, that any such drastic impairment of the legislative prerogative of local government should be undertaken only by specific legislative action and judicial review for compliance be limited in scope.

The judgment is affirmed.

FLEMING, Acting P. J., and BEACH, J., concur.

113 Cal.App.3d 875, 170 Cal.Rptr. 342

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125 Cal.App.3d 986
125 Cal.App.3d 986, 178 Cal.Rptr. 367
(Cite as: 125 Cal.App.3d 986)

C

RICHARD P. STEVENS et al., Plaintiffs and Appellants,
v.
CITY OF GLENDALE et al., Defendants and Respondents; HENSLER-MacDONALD, Real Party in Interest and Respondent.

Civ. No. 60299.

Court of Appeal, Second District, Division 5, California.

Oct 27, 1981.

SUMMARY

An individual and an organization instituted a mandamus proceeding against a city and its city council, alleging that the city's general plan and the housing element contained therein were illegal. Plaintiffs also challenged the legality of an environmental impact report (EIR) which pertained to a proposed housing subdivision and sought to have set aside a notice of determination regarding the EIR and related subdivision. As to the general plan and its housing element, the trial court determined that they complied with the Planning and Zoning Law (Gov. Code, § 65302). As to the EIR, the final version of which included new plans for the extension of an existing street, the trial court determined that public notice should have been given before its adoption. Accordingly, the trial court granted a writ of mandate requiring city officials to vacate the notice of determination and approval of the tentative tract map and to resume proceedings by providing public notice of the proposed revisions to the EIR. Plaintiffs' requests for attorney fees and costs were denied. (Superior Court of Los Angeles County, No. C269101, Charles H. Older, Judge.)

The Court of Appeal affirmed. The court held that substantial evidence supported the trial court's determinations with respect to the general plan and its housing element, noting that it contained standards and plans for the improvement of housing and for adequate housing sites and made adequate provisions for the housing needs of all economic segments of the community. The court also held that public notice was required before adoption of the final, revised EIR, but that it was premature to require the preparation of a supplemental report. As to plaintiffs' request for attorney fees pursuant to the private attorney general doctrine (Code Civ. Proc., § 1021.5), the court held that they were *987 properly denied, since it could not be said that a significant benefit had been conferred on the general public or a large class of persons. In so holding, the court noted that plaintiffs had prevailed only on a technical point. Finally, the court held that plaintiffs were not entitled to their costs (Code Civ. Proc., § 1032), since the issues on which they had prevailed were not substantial when compared to the many requests for relief which were denied. (Opinion by Sheldon, J., [FN*] with Ashby, Acting P. J., and Hastings, J., concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Zoning and Planning § 10--Content and Validity of Zoning Ordinances, Planning Enactments and Orders--Comprehensive Zoning--Validity of General Plan.
In a mandamus proceeding challenging the legal sufficiency of a city's general plan and the housing element contained therein, substantial evidence supported the trial court's determinations that the plan and its housing element complied with Gov. Code, § 65302 (setting forth required elements of general plan), as of the time of the approval of the revised tentative tract map at issue, where it contained standards and plans for the improvement of housing and for adequate housing sites and made adequate provisions for the housing needs of all economic segments of the community. In addition,

when read as a whole, the housing element coordinated with the other elements of the general plan and complied with the housing element administrative guidelines (Cal. Admin. Code, tit. 25, § 6300 et seq.).

(2) Zoning and Planning § 10--Content and Validity of Zoning Ordinances, Planning Enactments and Orders--Comprehensive Zoning--Advisory Nature of Housing Element Guidelines.
While the Planning and Zoning Law (Gov. Code, § 65000 et seq.), makes it mandatory for counties and cities to adopt a general plan which includes a housing element (Gov. Code, § 65302, subd. (c)), the housing element guidelines promulgated pursuant to such law are advisory and are not binding on communities. ***988**

(3) Zoning and Planning § 30--Conditional Uses; Permits and Certificates-- Judicial Review--Validity of Environmental Impact Report--Failure to Give Public Notice of Final Report.
In a mandamus proceeding challenging the legality of an environmental impact report (EIR) and seeking to set aside a city council's certification thereof, substantial evidence supported the trial court's finding that public notice was not given with respect to the final EIR, which included new plans for the extension of an existing street. Thus, the trial court properly entered judgment requiring local authorities to resume proceedings by providing notice to the public of the proposed revisions to the EIR. However, it was premature to require the preparation of a subsequent or supplemental EIR (Pub. Resources Code, § 21166).

[See **Cal.Jur.3d,** Pollution and Conservation Laws, § 393; **Am. Jur.2d,** Pollution Control, § 46 et seq.]

(4) Costs § 7--Amount and Items Allowable--Attorney Fees--Private Attorney General Doctrine.
In a mandamus proceeding challenging the legality of an environmental impact report and seeking to set aside a city council's certification thereof, the trial court properly denied plaintiffs' request for attorney fees pursuant to Code Civ. Proc., § 1021.5 (private attorney general doctrine), where plaintiffs prevailed only on a technical point and where they did not present adequate evidence that a public interest was affected. Thus, it could not be said that a significant benefit had been conferred on the general public or a large class of persons.

(5) Costs § 2--Right to Costs--When Plaintiff Receives Only Partial Recovery.
In a mandamus proceeding challenging the legality of an environmental impact report and seeking to set aside a city council's certification thereof, the trial court did not abuse its discretion in denying plaintiffs' request for costs (Code Civ. Proc., § 1032) , where the issues on which plaintiffs prevailed were not substantial when compared to the many requests for relief which were denied.

COUNSEL

Jones & Jones and Arthur T. Jones for Plaintiffs and Appellants. ***989**

Frank R. Manzano, City Attorney, and Dennis H. Schuck, Senior Assistant City Attorney, for Defendants and Respondents.

Davis, Tharp & Berg and Richard G. Berg for Real Party in Interest and Respondent.

SHELDON, J [FN*]

FN* Assigned by the Chairperson of the Judicial Council.

Richard P. Stevens and Chevy Chase Estates Association were the petitioners below and are the appellants. City of Glendale, Glendale City Council and individual members thereof are the respondents. Hensler-MacDonald, a joint venture, is the real party in interest (RPI).

Appellants filed a petition for writ of mandate and alternative writ of mandate pursuant to Code of Civil Procedure section 1085 wherein they sought to challenge the legal sufficiency of the City of Glendale's general plan and the housing element contained therein. In addition, pursuant to Code of Civil Procedure section 1094.5, they also challenged the legality of environmental impact report (EIR) No. 77-28, pertaining to tentative tract No. 32844 as adopted December 12, 1978, and sought to have set aside the notice of determination recorded on December 18, 1978, regarding this EIR

and the related subdivision. In this respect, the appellants sought to compel the city to reopen its hearing on the EIR and publish a final EIR in conformity with the California Environmental Quality Control Act (CEQA) of 1970 and the guidelines published in support thereof.

Appellants also filed a petition for attorneys' fees and costs.

The trial court signed a judgment granting the peremptory writ of mandate as to a particular aspect of the proceedings, to be discussed below. The request for attorneys' fees and costs were denied.

Appellants appeal from this judgment and the order denying attorneys' fees and costs. ***990**

Facts

On March 25, 1977, the RPI filed its application for approval of tentative subdivision map No. 32844 involving originally the construction of 830 single family residences on 309 acres of undeveloped hillside canyons in the San Rafael Hills section of Glendale.

On June 13, 1978, a notice of completion of a draft EIR (No. 77-28) was filed with the Secretary for Resources of the State of California. The draft EIR was made public on that date and public comment was solicited.

Respondents transmitted copies of the draft EIR to all responsible and interested agencies, including appellants, and also transmitted summaries of the draft EIR to 218 property owners within 300 feet of the proposed project.

On October 10, 1978, a joint public hearing on the draft EIR was held before the city council and the Environmental and Planning Board (EPB) of the City of Glendale. Adequate notice of this meeting was given, and public comment was orally received. After the hearing, the city council referred the project back to the EPB for further recommendations.

The EPB at its meeting on November 8, 1978, adopted the following "'proposed mitigation measures': (1) That 'A' Street be extended from the northerly boundary of the project site to connection [*sic*] with Camino San Rafael in Tract No. 31772, also known as the Emerald Isle Tract; (2) That the primary ridgeline in the project be retained in a natural state; and (3) That the number of housing units in the project be reduced."

On November 20, 1978, the RPI submitted to the planning department a revised tentative tract map which provided for the required mitigation measures. Based upon this revised tentative tract map and the independent evaluation and analysis of the environmental impacts by its staff, the EPB on November 29, 1978, submitted a proposed final EIR to the city council.

On December 12, 1978, the city council held a hearing on the final EIR, but did not give public notice of the revision extending "A" Street ***991** to the Emerald Isle tract. However, appellants and their attorney were present at the meeting and objected to the sufficiency of the EIR because it did not subject the extension of "A" Street to the Emerald Isle tract to public review.

The trial court found that this "extension of 'A' Street constituted a change in the project which required major revisions to the EIR due to the involvement of new environmental impacts not considered in the draft EIR, said revisions were incorporated in the final EIR."

Because of the failure to give the public notice, the trial court found that respondents had prejudicially abused their discretion, and accordingly, granted the writ of mandate commanding respondents to:

"1. Vacate and set aside the notice of determination recorded on or about December 18, 1978 with respect to the certification of Environmental 600 Impact Report No. 77-28 pertaining to tentative tract map No. 32844.

"2. Vacate and set aside its approval of tentative tract map No. 32844.

"3. To resume proceedings to process EIR No. 77-28 by providing notice to the public of the major revisions to the EIR due to the involvement of new environmental impacts not considered in the draft EIR and to give the public reasonable opportunity

to review and comment on said EIR prior to certification and *otherwise comply with CEQA* (italics added) and the State Guidelines.

"4. To refrain from approving revised tentative tract map No. 32844 until it has complied with the requirements of CEQA."

As to the approval of the subdivision itself, adequate public notice was given, as well as notice to the appellants, and an opportunity for them to be heard. Approval of tentative tract No. 32844 was given at a council meeting on December 12, 1978.

The trial court found that respondents had proceeded according to the requirements of the Subdivision Map Act in approving tentative tract No. 32844 except as stated above in the final approval of the EIR. ***992**

I

(1)Does the Glendale general plan contain all of the legally required elements, and is the Glendale housing element contained therein legally sufficient?

The Legislature has gathered the land use laws under a single title of the Government Code entitled "Planning and Land Use." [FN1]

> FN1 Government Code section 65302 provides: "The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements: ... [¶] (c) A housing element, to be developed pursuant to regulations established under Section 41134 of the Health and Safety Code, consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community."

The State Department of Housing and Community Development was authorized to develop and publish guidelines for the preparation of the housing element of the plan. This department's guidelines were promulgated in 1973 and codified in California Administrative Code, title 25, sections 6300 through 6350.

In March of 1972 the City of Glendale adopted the 1990 open space recreation and conservation elements of the Glendale general plan with additional elements added from time to time, including the adoption of the housing element on July 15, 1975, and amended on August 1, 1978.

Appellants quoted from the case of *O'Loane v. O'Rourke* (1965) 231 Cal.App.2d 774 at page 785 [42 Cal.Rptr. 283] in characterizing the general plan as follows: "The adoption of the general plan is, in effect, the adoption of a policy, and in many respects, entirely new policy. The plan is of permanent and general character, it is a declaration of public purpose and, as such, supposedly sets forth what kind of a city the community wants and, supposedly, represents the judgment of the electors of the city with reference to the physical form and character the city is to assume."

The housing element guidelines (Cal. Admin. Code, tit. 25, §§ 6300-6350) contain the following provisions: "6310. Scope and Goals. At least four broad goals of a housing element have been identified. The ***993** goals listed below may be expanded to include others of local concern and impact.

"(a) To promote and insure the provision of adequate housing for all persons regardless of income, age, race, or ethnic background.

"(b) To promote and insure the provision of housing selection by location, type, price and tenure.

"(c) To promote and insure open and free choice of housing for all.

"(d) To act as a guide for municipal decisions and how these decisions affect the quality of the housing stock and inventory."

Section 6340 provides that other elements must be correlated with the housing element, including the following: Land use, circulation, noise, open space, conservation and seismic safety.

The housing element of the City of Glendale, adopted July 15, 1975, lists as its goals the following: (1) Expand the range of housing opportunities for every Glendale citizen; (2) improve the quality of the city's housing supply; (3) establish free access of all persons to all types of housing without restrictions based on race, color, creed, sex or national origin; (4) ensure that new housing enhances the total environment and family life styles. The objectives for each goal are set forth in the elements.

Data representing the major overall physical, social and economic findings associated with Glendale's housing is reported in detail.

The following are the areas of a detailed analysis and their mitigation measures: (1) Air quality, (2) water/earth resources, (3) biological resources, (4) noise, (5) urban development, (6) service systems, (7) public facilities, (8) parks and recreation, (9) archaeological and historic resources, (10) community attitudes, (11) social, (12) economics, (13) aesthetics, (14) energy, (15) traffic and transportation.

Problems which were noted in the above areas were mitigated by the reduced number of units, more park area, dedication of land for a school, maintaining the ridgeline, and the extension of "A" Street. ***994**

The housing element analyzes the housing problem issues in Glendale and makes recommendations for solution of the problems. The element also includes a breakdown of the city by communities, with an inventory and analysis of the housing units in each community. Proposed recommendations are set forth for each community.

An amendment to the housing element was adopted July 17, 1978, which further expanded the goals of the element. When read as a whole, the housing element coordinates with the other elements of the Glendale general plan and complies with the housing element guidelines.

The 1990 open space, recreation and conservation element "has as its primary consideration the existing and proposed public land available to the city's residents. A review of the number and location of commercial and quasi-public recreational facilities is also included to point out the extent of the private supply of open space and recreational opportunities. These vary from golf courses to church activities."

The project, which is the subject of this action, is located in the community designated as "the San Rafael Hills." The open space plan states: "One of the priorities for the San Rafael Hills, as for the Verdugo Mountains, will be the preservation of the ridge lines." Included in the final map of the project, in addition to expanded park areas and recreation areas, was the ridge all of which was left as open space.

In the housing element the land through which the extension of "A" Street would go was designated for either acquisition or *regulation*. The mitigation measure which required the extension of "A" Street through a V-cut in the ridge line specified in detail how the slopes should be cut, the kind of landscaping to be allowed, and the type of review to be conducted by the public works division and geologist. It further regulated the size, shape, width, grade and contours of the cut as well as other details.

The open space element provides for methods for open space and conservation preservation and contains the following provision: "Open spaces can be controlled through regulatory means including zoning and subdivision control."

The draft EIR, which was prepared by Olson Laboratories, a privately employed company, contained an extensive analysis of the traffic ***995** volume, its flow and impact on the different areas. The report concluded that a third access point was crucial. The extension of "A" Street would mitigate this problem. However, the environmental effects of this extension as part of the final EIR were never noticed for a hearing. Accordingly, input from responsible agencies and from the public was not obtained. Potential effects of the extension of "A" Street could be (1) additional traffic use; (2) increase in ambient noise; (3) exposure of people or structures to major geologic hazards; and (4) disruption or division of the physical arrangement of an established community.

The draft EIR considered the following alternatives

to the project: (1) No project alternative; (2) filled area alternative; (3) clustered development alternative; (4) ridgetop preservation alternative.

In selecting an alternative, CEQA guidelines require that the agency outline specific social, physical, or economic reasons why alternative projects which minimize significant adverse effects cannot be implemented. The draft EIR analyzes the filled area, clustered and ridgetop preservation alternatives, but does not do so for the no project alternative.

Public Resources Code section 21002 provides: "The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof."

After preparation of the draft EIR, mitigation measures were adopted by the EPB as indicated above and were incorporated in the revised tentative tract map. These mitigation measures substantially lessened or avoided significant adverse environmental effects of the project.

County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185 [139 Cal.Rptr. 396], held that where the EIR failed to include a genuine ***996** "no project" alternative, the EIR did not comply with CEQA. However, in *Inyo*, the EIR did not fully or fairly describe the project that was in fact involved. *Laurel Hills Homeowners Assn. v. City Council* (1978) 83 Cal.App.3d 515, at page 521 [147 Cal.Rptr. 842], held that under CEQA, "if the feasible mitigation measures substantially lessen or avoid generally the significant adverse environmental' effects of a project, the project may be approved without resort to an evaluation of the feasibility of various project alternatives contained in the environmental impact report." The act "does not mandate the choice of the environmentally best feasible project if through the imposition of feasible mitigation measures alone the appropriate public agency has reduced environmental damage from a project to an acceptable level."

The draft EIR identified a "no project" alternative but did not give an analysis of it. It is noted that the requirements of Public Resources Code sections 21002 and 21002.1 are alternative rather than conjunctive requirements. Therefore, since feasible mitigation measures were proposed and adopted, as indicated above, the requirements of CEQA in this respect were met.

It is the decision of this court that there was substantial evidence, including that discussed above, introduced at the trial to support the trial court's determination that the respondent's general plan complies with all of the provisions of Government Code section 65302. The evidence further upholds the trial court's determination that the housing element at the time of the approval of the revised tentative tract map No. 32844 complies with Government Code section 65302, subdivision c, and its guidelines, and contains standards and plans for the improvement of housing and for adequate sites for housing and makes adequate provisions for the housing needs of all economic segments of the community of Glendale.

Although it is not binding on this court, the decision in *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875 [170 Cal.Rptr. 342], also upheld the legality and sufficiency of this same Glendale housing plan and housing element.

II

(2)Are the housing element guidelines merely advisory and not binding upon communities? ***997**

As decided above, the Glendale general plan and the housing element are valid under the law; however, appellants raised the question that the guidelines are binding on the local agencies and are not merely advisory.

While California's Planning and Zoning Law, Government Code section 65000 et seq., makes it mandatory for counties and cities to adopt a general plan, it makes the guidelines for the preparation and content of the elements required in the general plan advisory.

Government Code section 65040.2 states in part: "For purposes of this section, the guidelines prepared pursuant to Section 41134 [subsequently reenacted as Health and Safety Code section 50459] of the Health and Safety Code shall be the guidelines for the housing element required by Section 65302." and states further that such " *guidelines shall be advisory* to each city and county in order to provide assistance in preparing and maintaining their respective general plans." [FN2] (Italics added.) This statement is reiterated in Assembly Bill No. 2853 (Gov. Code, § 65585) to become operative October 1, 1981.

> FN2 The housing element guidelines, pursuant to the authority granted in Health and Safety Code section 41134, are promulgated in title 25, California Administrative Code, subchapters 3 and 4, section 6300 et seq., section 6400 et seq.

The advisory nature of the guidelines is reflected in the holdings of two unpublished cases of California appellate courts: *Lennard v. City of El Centro* (Jan. 5, 1977) 1 Civ. No. 34762 and *Save Julland Canyon Committee v. Planning Commission of the City of San Diego* (Jan. 5, 1977) 4 Civ. No. 14780. There is no logical reason to give the housing element the weight of binding law and leave the other elements merely advisory.

The appellant contends that the guidelines for the housing element mandate a specific "action" program. In other words, appellant contends that the provisions of Government Code section 65302, subdivision (c), regarding the housing element requires the cities and counties to affirmatively plan in terms of "who, what and when" for the creation of housing.

A review of the housing element of the City of Glendale presents a comprehensive analysis of the present housing inventory and future ***998** needs. This issue was presented and discussed in *Bownds* and the court in that decision aptly stated: "In the absence of more specific legislation, it would ill-behoove any court to indirectly mandate such a specific 'action' program under the guise of declaring an otherwise complete and comprehensive plan to be inadequate, basing its decision on nothing more than a subjective interpretation of such nonspecific language."

We hold that the housing element guidelines are merely advisory.

III

(3)Did the revision of the project by the extension of "A" Street require the preparation of a subsequent or supplemental EIR?

Public Resources Code section 21166, as amended, provides as follows: "When an environmental impact report has been prepared for a project pursuant to this division, no subsequent *or supplemental* environmental impact report shall be required *by the lead agency or by any responsible agency*, unless *one or more* of the following events occurs: [¶] (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report. [¶] (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report. [¶] (c) *New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.*"

There is substantial evidence in the record, discussed in part above, to uphold the trial court's finding that "Between the date of the filing of the application for a subdivision by the RPI and the certification of the EIR No. 77-28 by the City Council, the respondents proceeded in a manner provided by the California Environmental Quality Act (CEQA) and the Guidelines and regulations adopted pursuant thereto" except that public notice was not given on the final EIR which included the extension of "A" Street. The evidence in the record discloses that there was extensive public consultation and input from both public agencies and concerned citizens as required by CEQA.

The peremptory writ which the trial court granted ordered the respondents to: ***999**

"(1) Vacate and set aside the notice of determination recorded on or about December 18, 1978 with respect to the certification of Environmental 600 Impact Report No. 77-28 pertaining to tentative tract map No. 32844.

"(2) Vacate and set aside its approval of tentative tract map No. 32844.

"(3) To resume proceedings to process EIR No. 77-28 by providing notice to the public of the major revisions to the EIR due to the involvement of new environmental impacts not considered in the draft EIR and to give the public reasonable opportunity to review and comment on said EIR prior to certification and otherwise comply with CEQA and the State Guidelines.

"(4) To refrain from approving revised tentative tract map No. 32844 until it has complied with the requirements of CEQA."

Thus, the effect of the trial court's judgment is to require respondents to go back to the point where the draft EIR was approved, give notice to the public of the proposed revisions to the EIR. At that time, interested parties will have the opportunity to review and comment on the draft EIR. If, at that time it does appear that substantial changes are proposed which will require major revisions of the EIR, then a subsequent or supplemental EIR will be required and a hearing held thereon. The certification of the EIR was vacated and, therefore, the EIR process has not been completed. To require a subsequent or supplemental EIR at this time is premature.

IV

Attorney's Fees and Costs

(4)Based upon the discussion by the California Supreme Court in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917 [154 Cal.Rptr. 503, 593 P.2d 200] the issue of attorney's fees is predicated on the authority contained in Code of Civil Procedure section 1021.5. The Legislature adopted Code of Civil Procedure section 1021.5 in 1977 authorizing awards of attorney fee under the attorney general doctrine as a codification of the private attorney general doctrine ***1000** that had been developed in numerous prior judicial decisions. [FN3] The trial court, then, had the discretion to award attorneys' fees to a successful party in an action which resulted in the enforcement of an important right affecting the public interest if a significant benefit has been conferred on the general public or a large class of persons.

> FN3 Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

The award for attorneys' fees is for a decision which results in the enforcement of an *important* right affecting the public interest. The appellants asserted in their petition violations of what could be deemed "important " rights; however, they prevailed only on a technical point of lack of public notice on the final EIR. Further, appellants did not present adequate evidence that a public interest was affected. The affected parties were adjoining neighbors. The appellants did receive adequate notice of the revised tentative tract map which included the proposed extension of "A" Street. An adjudication was made by the trial court on the issues of the important rights contrary to appellants' requests. This adjudication was supported by findings which in turn were based on substantial evidence. Accordingly, as to the present posture of the case it cannot be said that a significant benefit has been conferred on the general public or a large class of persons.

(5)Appellants requested costs to be awarded pursuant to the authority of Code of Civil Procedure section 1032. [FN4]

> FN4 Code of Civil Procedure section 1032 , subdivision (a), state: "To a plaintiff upon a judgment in his favor; in an action for the recovery of real property; in an action to recover the possession of personal property; in an action for the recovery of money or damages; in a special proceeding; in an action which involves the title or possession of real estate or the legality of a tax, impost, assessment, toll, or municipal fine."

Costs will be allowed to a plaintiff upon a judgment in his favor or "if he receives a substantial though partial recovery," 4 Witkin, California Procedure (2d ed. 1971) at page 3246. In the instant case the issues on which appellants prevailed were not "substantial" when compared to the many requests which were denied. The trial court did not abuse its discretion ***1001** in denying costs and its order is supported by substantial evidence.

The judgment is affirmed.

Ashby, Acting P. J., and Hastings, J., concurred. ***1002**

Cal.App.2.Dist.,1981.

Stevens v. City of Glendale

END OF DOCUMENT

71 Cal.2d 96
71 Cal.2d 96, 453 P.2d 728, 77 Cal.Rptr. 224
(Cite as: 71 Cal.2d 96)

WAYNE L. FERDIG, Plaintiff and Appellant,
v.
STATE PERSONNEL BOARD et al., Defendant and Respondent.

Sac. No. 7823.

Supreme Court of California

May 8, 1969.

HEADNOTES

(1) Civil Service § 4.5--Veterans' Preferences.
A civil service applicant was not entitled to any veterans' preference credits under Gov. Code, § 18973, providing therefor and defining veteran, where his service in the merchant marine did not satisfy the statutory service requirement specified as essential for a veterans' preference.

Character of service or connection with military or naval service necessary to entitle one to benefit of veterans' preference statute in relation to civil service, note, 87 **A.L.R.** 1002. See also **Cal.Jur.2d,** Civil Service, § 14; **Am.Jur.2d,** Civil Service, §§ 26, 27.

(2) Civil Service § 4.5--Veterans' Preferences.
In the context of civil service, authority to determine the allowance of veterans' preferences emanates from the California Constitution (Cal. Const., art. XXIV, § 7) and has been in turn conferred by the Legislature upon the Department of Veterans Affairs (Gov. Code, § 18976); the department is charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference and in carrying out this responsibility it must make its determination in accordance with the statute allowing additional credit to veterans (Gov. Code, § 18973), but the veteran has some responsibility in presenting proof of eligibility to the department (Gov. Code, § 18976).

(3a, 3b, 3c) Civil Service § 4.5--Veterans' Preferences.
The appointment of a state civil service applicant was void, and the State Personnel Board had jurisdiction to revoke it and to remove the appointee from ***97** his position, where his right to appointment was dependent on veterans' preference credits and the appointment had been made as a consequence of the applicant's erroneous representation to the Department of Veterans Affairs that he was a veteran when in fact he was not.

(4) Civil Service § 3--Constitutional and Statutory Provisions.
The action of the Department of Veterans' Affairs invoked by a request for veterans' preference credits is an integral part of the civil service system established by the People and implemented by the Legislature through the State Civil Service Act; the system is grounded on the constitutional mandate that permanent appointments and promotion in the state civil service shall be based upon merit, efficiency and fitness as ascertained by competitive examination; the Legislature has provided a detailed method of carrying out the constitutional mandate, so that appointments shall be based upon merit and fitness.

(5) Civil Service § 4.5--Veterans' Preferences.
Where a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credit, the Department of Veterans' Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) Administrative Law § 37--Validity of Administrative Action--Compliance With Constitutional and Statutory Provisions.
Administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute; and an administrative agency must act within the powers

conferred upon it by law and may not validly act in excess of such powers.

See **Cal.Jur.2d,** Administrative Law, § 63; **Am.Jur.2d,** Administrative Law, § 188.

(7) Civil Service § 1--State Personnel Board.
The State Personnel Board is a body of special and limited jurisdiction and has no powers except such as the law of its creation has given it.

(8) Civil Service § 3--Constitutional and Statutory Provisions.
The jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from Cal. Const., art. XXIV, § 3, which directs that the board shall administer and enforce the civil service laws, and its authority is governed by the Constitution as well as by the Civil Service Act.

See **Cal.Jur.2d,** Civil Service, § 5.

(9) Civil Service § 12(2)--Discharge, Demotion, Suspension and Dismissal-- Hearing--State Personnel Board.
The State Personnel Board was ***98** within its power in entertaining a challenge to the legality of a civil service applicant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully, though in good faith, made based on unauthorized veterans' preference credits, where the board received the prompt and full cooperation of the Department of Veterans' Affairs which itself reexamined the applicant's eligibility for veterans' preference credits and removed them, where an objection was raised with the department only a month after the applicant's appointment, and an objection was made to the board approximately three months later, and where both agencies promptly reviewed the matter.

(10) Civil Service § 10--Discharge, Demotion, Suspension and Dismissal-- Grounds.
Gov. Code, § 19173, providing for rejection of probationers for certain deficiencies, was not intended to cure any defect in certification and appointment deriving from violation of the civil service statutes, and its provisions for rejection of a civil service appointee during a probationary period were inapposite, where the applicant's separation from a position to which he sought reinstatement was effectuated under the implied power of the State Personnel Board to rectify appointments made in violation of the civil service laws in appointing the applicant, who was qualified for the position in question by passing the examination, but not eligible to be certified for the position.

(11) Civil Service § 12(1)--Hearing--Time for Protest.
It was not necessary that a protestor of a civil service appointment file an "appeal" to the State Personnel Board within the time limits prescribed by its rules where the board, upon the matter being called to its attention, had jurisdiction to review and correct its initial action based on allowance of unauthorized veterans' preference credits by which a civil service applicant improperly secured eligibility for certification and appointment; and, in any event, the protest was timely made where 15 days thereafter the Department of Veterans' Affairs formally notified the personnel board that the applicant's veterans' preference had been "removed."

SUMMARY

APPEAL from a judgment of the Superior Court of Sacramento County. Mamoru Sakuma, Judge. Affirmed.

Proceeding in mandamus to compel the State Personnel Board to set aside its order revoking an appointment to a civil service position. Judgment denying writ affirmed.

COUNSEL

Walter W. Taylor for Plaintiff and Appellant. ***99**

Thomas C. Lynch, Attorney General, William M. Goode and Robert Burton, Deputy Attorneys General, and Harry T. Kaneko for Defendants and Respondents.

SULLIVAN, J.

This is an appeal from a judgment denying a writ of mandate to compel respondent State Personnel Board (Board) [FN1] to set aside and annul its order revoking the appointment of appellant Wayne L. Ferdig to a state civil service position, and to

reinstate appellant in said position.

> FN1 Respondents named in the court below were the following: (a) The Board and members Joseph L. Wyatt, Jr., Robert S. Ash, May Layne Bonnell, Ford A. Chatters and Samuel Leask, Jr.; (b) Theodore J. Walas; Frederick Granberg and Murray J. Hunter, three individuals entitled to certification for the position involved on the alleged ground that appellant's certification was illegal; and (c) nine individuals ranking above appellant on the employment list on the alleged ground that the allowance of veterans' preference credits to appellant was illegal. The record discloses that only those named in (a) and (b) appeared in the court below. Respondents named in (a) have appeared in this court through the Attorney General; respondent Walas did not file a brief herein but appeared by counsel at oral argument; the other respondents have not appeared herein.

The facts are not in dispute and, as disclosed by the trial court's findings and the documents in the record, are as follows: On May 14, 1962, appellant was appointed to the class of Refrigeration Engineman with no veterans' preference requested or applied to his score. On March 12, 1963, he was transferred to the class of Office Building Engineer.

On July 20, 1963, appellant took an examination for class of Chief Engineer II in the Department of General Services and the employment list established on October 1, 1963, ranked him as number 16. On October 17, 1963, he applied to the Department of Veterans Affairs (Department) for a veterans' preference, presenting a certificate of discharge. This document was issued by the United States Naval Service and certified in substance that appellant, described therein as "Apprentice Seaman, Class M-1" had been honorably discharged from said service. It indicates on its face appellant's service in the United States Naval Reserve, as distinguished from the United States Navy; another document in the record refers to appellant's service as "war-time service in the merchant marine." As a result of said presentation, the Department of Veterans Affairs notified the Board that veterans' preference points were applicable to appellant's score, thereby moving appellant up to number 4 on the list.

As a result of a waiver by a person ahead of him, appellant then became one of the top three on the list and thus eligible ***100** for appointment. On August 24, 1964, he was appointed to the position of Chief Engineer II. Without the addition of veterans' points, he would not have been within the top three on the list.

On September 25, 1964, the question was raised with the Department of Veterans Affairs as to whether the application of veterans' preference points to appellant's case was proper. The Department then requested appellant to resubmit the documents supporting his claim therefor. On November 9, 1964, approximately nine weeks after appellant's appointment to the position, the Department advised appellant that his application for the points had been approved erroneously. Appellant objected to this determination and the Departent directed an inquiry to the appropriate federal agency as to whether appellant's service and training in the Naval Service was considered active duty in the armed forces of the United States.

On January 4, 1965, an officer of Local 411 of the Union of State Employees, by letter to the Board, questioned the legality of appellant's appointment as Chief Engineer II. Shortly thereafter the Judge Advocate of the Department of the Navy advised the Department of Veterans affairs that appellant had performed no active duty or other active naval service. The latter Department thereupon notified both appellant and the Board that it had removed appellant's veterans' preference. On April 9, 1965, the Board, after a hearing, made its order revoking appellant's appointment "from the beginning."

The trial court, concluding that the Board had acted lawfully, denied appellant's petition for a peremptory writ of mandate and discharged the alternative writ theretofore issued. This appeal followed.

Appellant makes no claim before us that he is, or ever was, a veteran as that term is used in Government Code section 18973 [FN2] which provides for additional credits for veterans attaining

passing marks in specified examinations. Essentially he advances two contentions: First, that the jurisdiction of the Board to remove civil service employees is expressly limited by statute and appellant's removal was not authorized by any statute; and second, that although the Board's action in crediting him with veterans' preference points was erroneous, ***101** it had nevertheless become final and the Board was without jurisdiction to reconsider or correct it.

FN2 Hereafter, unless otherwise indicated, all section references are to the Government Code.

We turn first to the circumstances of appellant's appointment. The record before us establishes without any contradiction that appellant was not entitled at any time to the veterans preference points which advanced him from number 16 to number 4 and eventually to number 3 on the list, and thereby made him eligible for appointment.

(1) Section 18973 at the times here material provided that in certain examinations "a veteran with 30 days or more of service" who becomes "eligible for certification from eligible lists by attaining the passing mark established for the examination" shall be allowed specified additional points. The statute further provided: "For the purpose of this section, 'veteran' means any person who has served full time for 30 days or more in the armed forces in time of war or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States, or during the period September 16, 1940, to December 6, 1941, inclusive, or during the period June 27, 1950, to January 31, 1955, and who has been discharged or released under conditions other than dishonorable, ..." [FN3]

FN3 Section 18973 underwent minor revisions in 1967 and 1968 which are not material in the present case.

(2) Appellant was not a "veteran" within the meaning of the above statute. His service in the merchant marine did not satisfy the statutory service requirements specified as essential for a veterans' preference. The plain fact of the matter is that appellant was not entitled to any veterans' preference credits. Indeed, appellant himself seems to concede all this.

Authority to determine the allowance of veterans' preferences emanates from the California Constitution [FN4] and has been in turn conferred by the Legislature upon the Department of Veterans Affairs. (§ 18976.) [FN5] The Department is thus ***102** charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference. We think it is clear that in carrying out this responsibility the Department must make its determination in accordance with the statute allowing the additional credits. (§ 18973; see fn. 3, *ante.*)

FN4 Section 7 (entitled "Veterans' Preferences") of article XXIV (entitled "State Civil Service") of the California Constitution provides: "Nothing herein contained shall prevent or modify the giving of preferences in appointments and promotions in the State civil service to veterans and widows of veterans as is now or hereafter may be authorized by the Legislature."

FN5 Section 18976 provides: "Request for and proof of eligibility for veterans' preference credits shall be submitted by the veteran to the Department of Veterans Affairs. The procedures and time of filing such request shall be subject to rules promulgated by the Department of Veterans Affairs. After the State Personnel Board certifies that all parts of an examination have been completed and the relative standings of candidates are ready to be computed the Department of Veterans Affairs shall notify the State Personnel Board which candidates have qualified for veteran preference credits on the examination."

But the veteran himself has some responsibility in these matters. Under section 18976: "Request for and *proof of eligibility for veterans' preference credits* shall be submitted *by the veteran* to the Department of Veterans' Affairs." (§ 18976). (Italics added.) In the instant case, appellant's application for veterans' preference made on an

official form of the Department is before us. At the top of the document in large bold type appears the following: "Instructions and Eligibility Requirements Are Listed on the Back of This Application." The reverse of the document contains, among other things, an explicit statement of the eligibility requirements in accordance with the language of section 18973. [FN6] Immediately above appellant's signature on the face of the application appears the following: "Signature: I Hereby Certify that I am eligible for veterans' preference and that the statements on this application are true, and I agree and understand that any misrepresentation of material facts herein may cause forfeiture of all right to any employment in the service of the State of California."

> FN6 For example the first sentence reads in pertinent part as follows: "Only veterans with active service in the *armed forces* of the United States *in time of war,* or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States ... may receive a 10-point preference on State of California civil service examination ...." (Italics added.)

(3a) In sum, not only was the allowance of a veteran's preference to appellant unauthorized because he was at no time a veteran; it was also made as a consequence of appellant's erroneous representation to the Department that he was a veteran, when in fact he was not. Although appellant's representation may have been made in good faith and the Department's action may be characterized as a mistake, nevertheless the fact remains that the Department notified the Board that appellant was a candidate who qualified for veterans' preference credits on the examination (§ 18976) when in fact he did not.

(4) The action of the Department which appellant invoked by his request for veterans' preference credits was an integral ***103** part of the civil service system established by the people (Cal. Const., art. XXIV; see *Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 639 [234 P.2d 981]) and implemented by the Legislature through the State Civil Service Act (Act) (§§ 18500-19765). This system is grounded upon the constitutional mandate that permanent appointments and promotion in the state civil service shall be "based upon merit, efficiency and fitness as ascertained by competitive examination." (Cal. Const., art. XXIV, § 1; see Gov. Code, §§ 18500, 18930, 18950). The Act provides a detailed method of carrying out this mandate (§ 18500, subds. (a) and (c)) so that among other objectives, appointments shall be based upon merit and fitness (§ 18500, subd. (c) (2)) and state civil service employment can be made a career. (§ 18500, subd. (c) (3).) It is manifest from an examination of the Act that the Legislature has taken great pains to prescribe exactly how appointment to state civil service positions is to be made. (See for example §§ 18532, 18900, 18950, 19052.) This finds emphatic confirmation in section 19050: "The appointing power in all cases not excepted or exempted by virtue of the provisions of Article XXIV of the Constitution shall fill positions by appointment, including cases of transfers, reinstatements, promotions and demotions, in strict accordance with this part and the rules prescribed from time to time hereunder, *and not otherwise.* Except as provided in this part, appointments to vacant positions shall be made from employment lists." (Italics added.)

(5) Viewing in this context the provisions of the Act dealing with veterans' preferences, we have no hesitancy in concluding that where, as in the instant case, a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credits, the Department of Veterans Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. (*United States Fid. & Guar. Co. v. Superior Court* (1931) 214 Cal. 468, 471 [6 P.2d 243]; *Pacific Employers Ins. Co. v. French* (1931) 212 Cal. 139, 141-142 [298 P. 23]; *Grigsby v. King* (1927) 202 Cal. 299, 304 [260 P. 789]; *Garvin v. Chambers* (1924) 195 Cal. 212, 220- 223 [232 P. 696]; *Motor Transit Co. v. Railroad Com.* (1922) 189 Cal. 573, 577 [209 P. 586]; see ***104** *Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d 822 [215 P.2d 441]; *State Comp. Ins. Fund v. Industrial Acc. Com.* (1942) 20 Cal.2d

264, 266 [125 P.2d 42]; *Allen v. McKinley* (1941) 18 Cal.2d 697, 705 [117 P.2d 342]; 1 Am.Jur.2d Administrative Law, § 70, p. 866.) An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers. (See cases cited immediately above; see 2 Am.Jur.2d, Administrative Law, § 188, pp. 21-22.) (3b) In accordance with these principles, it has been held in this state, in matters pertaining to civil service and in other contexts, that when an administrative agency acts in excess of, or in violation, of the powers conferred upon it, its action thus taken is void. (See *Aylward v. State Board of Chiropractic Examiners* (1948) 31 Cal.2d 833, 839 [192 P.2d 929]; *Patten v. California State Personnel Board* (1951) 106 Cal.App.2d 168, 172-175 [234 P.2d 987]; *Pinion v. State Personnel Board* (1938) 29 Cal.App.2d 314, 319 [84 P.2d 185]; *Campbell v. City of Los Angeles* (1941) 47 Cal.App.2d 310, 313 [117 P.2d 901].) To hold otherwise in the case before us would be to frustrate the purpose of the civil service system.

Having concluded that appellant was not entitled to the appointment in the first place and that his appointment was void, we proceed to determine whether the Board had jurisdiction to revoke his appointment "from the beginning" and to remove him from his position. As we have already pointed out, appellant attacks such action on two broad grounds: First, he argues, the jurisdiction of the Board is expressly limited by statute and no statute authorizes his removal; secondly, since at the time of his removal he had already performed efficient service for more than the six months' probationary period, he had become a permanent employee and his appointment had become final.

Appellant's first argument is launched from section 19500 [FN7] which deals with the tenure of permanent employees and their separation from state civil service. The gist of the argument is that none of the methods of separation delineated in section 19500 apply in the instant case, and that since the Legislature ***105** has designated these methods of separation, it has of necessity excluded all others. The argument is misconceived and indeed ignores the circumstances of the problem before us. We are obviously not dealing with any of the situations covered by section 19500; nor are we dealing with a removal for cause based on any of the causes for discipline specified in section 19572.

> FN7 Section 19500 provides: "The tenure of every permanent employee holding a position is during good behavior. Any such employee may be temporarily separated from the State civil service through layoff, leave of absence, or suspension, permanently separated through resignation or removal for cause, or permanently or temporarily separated through retirement *or terminated for medical reasons under the provisions of Section 19253.5."*
> Section 19253.5 makes provision for a medical examination of an employee for purposes of evaluating his capacity to perform his duties.

What we examine here is the jurisdiction of the Board to take corrective action with respect to an appointment which it lacked authority to make. It defies logic to say that the mere enumeration in the Act of the methods of separating an employee from state civil service in a situation where an appointment has been validly made, compels the conclusion that no jurisdiction exists to rectify the action of the Board in a situation where an appointment has been made without authority.

(7) It is true, as appellant argues, that the "State Personnel Board is a body of special and limited jurisdiction [and] ... has no powers except such as the law of its creation has given it." (*Conover v. Board of Equalization* (1941) 44 Cal.App.2d 283, 287 [112 P.2d 341].) (8) But article XXIV, section 3 of the California Constitution directs that the Board "shall administer and enforce" the civil service laws. The jurisdiction of the Board, including its adjudicating power is derived directly from this section. (*Boren v. State Personnel Board, supra,* 37 Cal.2d 634, 637-638; *Neely v. California State Personnel Board* (1965) 237 Cal.App.2d 487, 488-489 [47 Cal.Rptr. 64]) and the Board's authority is governed by the Constitution as well as by the Civil Service Act. (*Boren v. State Personnel Board, supra,* 37 Cal.2d 634, 640- 641.)

Additionally we note that the Act provides in section 18670: "The board may hold hearings and make investigations *concerning all matters relating*

to the enforcement and effect of this part and rules prescribed hereunder. It may inspect any State institution, office, or other place of employment affected by this part to *ascertain whether this part and the board rules are obeyed.*

"The board shall make investigations and hold hearings at the direction of the Governor or the Legislature or upon the petition of an employee or a citizen *concerning the enforcement and effect of this part and to enforce the observance of the provisions of Article XXIV of the Constitution and of this part* and the rules made hereunder." (Italics added.)

The provisions of the Constitution and of the Act to which ***106** we have just referred, considered in the light of the purpose, objective and entire scheme of the civil service system, convince us that in the matter here under review the Board was invested with the power, and, indeed, charged with the duty, to "administer and enforce" the applicable sections dealing with veterans' preference credits. (§§ 18973 , 18976; see text accompanying fn. 3, *ante*; see fn. 5, *ante*.) Thus, after having been notified by the Department of Veterans Affairs which candidates had qualified for veterans' preference credits (§ 18976), it was the duty of the Board to apply such credit (§ 18974) and eventually to certify the three highest names on the eligible list to the appointing power. (§ 19057.) Essentially and in the final analysis, it was the Board which was charged with the responsibility of coordinating all of the procedures of the Act to the end of certifying only those persons who were lawfully entitled to the position. [FN8] In this constitutional and legislative scheme, a determination made by the Department contrary to the provisions of the Act, albeit in good faith, as to qualification for veterans' preference credits could not be conclusive upon the Board. If this were so, the Board's power to administer and enforce the Act would be eroded and that body would be compelled to certify for appointment persons who were in fact not entitled to the position.

> FN8 We emphasize that the determination of eligibility for veterans' preference credits is only one step in a procedure designed to have promotions and appointments based upon merit, efficiency and fitness. To accomplish this objective, the Board is charged, inter alia, with the responsibility of administering competitive examinations (§ 18930), setting passing grades (§ 18937), determining each competitor's earned rating (§ 18936), modifying these ratings by applying veterans' preference points (§ 18974), preparing eligible lists of those persons who may be lawfully appointed to any position within the class for which the examination is held (§ 18900), and certifying the three highest names to the appointing power. (§ 19057.)

(3c) We conclude, therefore, that when the matter was brought to its attention, the Board had jurisdiction to inquire into and review the certification as to veterans' preference credits made by the Department of Veterans Affairs and having determined that appellant was not entitled to such credits, to take the corrective action which it did by revoking appellant's appointment. While this jurisdiction does not appear to have been conferred upon the Board in so many words by the express or precise language of constitutional or statutory provision, there can be no question that it is implicit in the constitutional and statutory scheme which empowers the Board to administer and enforce the civil service laws. ***107**

(9) We are satisfied that the Board was well within its power in entertaining the challenge made to the legality of appellant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully made, although made in good faith. In this, as we have already pointed out, the Board apparently received the prompt and full cooperation of the Department of Veterans Affairs which itself reexamined appellant's eligibility for veterans' preference credits and removed the preference. In the light of this background-an objection raised with the Department only a month after appellant's appointment, an objection made to the Board approximately three months later, and the prompt review of the matter by both agencies-appellant's insistent claim to an appointment to which he was not entitled in the first place, is exposed as utterly groundless. We can apprehend neither reason nor fairness in the position of appellant, who seemingly

acknowledges that he was at no time a veteran within the terms of the statute but nevertheless insists that he should be permitted to retain the veteran's benefits to which he was never entitled.

We therefore reject appellant's arguments, first, that the Board having once made a good faith determination as to appellant's position on the list and having acted upon it, had no reserved power to annul its action; and second, that the appointment having once been accepted in good faith by appellant who performed efficiently in the position for the probationary period, could not be thereafter revoked by the Board.

As to the first argument, we have already explained why the Board had jurisdiction to review the matter and to take the corrective action it did. Our conclusions on this point are consistent with California precedents. In the cases already cited exemplifying the principle that appointments in violation of the civil service laws are void, it was recognized that the appropriate board had jurisdiction to correct the unlawful action taken. In *Campbell v. City of Los Angeles, supra,* 47 Cal.App.2d 310, mandate was denied to compel reinstatement of a civil service employee who had been reappointed after having been illegally restored to the eligibility list by the civil service commission and was subsequently discharged on the ground that since his restoration to the list was illegal, his appointment was illegal. Although the discharge seems to have been initially made by the department head, it was ***108** passed upon and sustained by the civil service commission. In *Pinion v. State Personnel Board, supra,* 29 Cal.App.2d 314, the court denied mandate to compel the Board to recognize the petitioners, who had permanent status under civil service, as properly holding certain civil service positions although they had been actually certified for only a class of junior positions. It was there said: "The only positions lawfully held by these petitioners are those for which they were examined and to which they were certified and appointed in the manner provided by law." (29 Cal.App.2d at p. 318.) In *Aylward v. State Board of Chiropractic Examiners, supra,* 31 Cal.2d 833, 839, we said: "Implicit in the cases denying a board's power to review or reexamine a question, however, is the qualification that the board must have acted within its jurisdiction and within the powers conferred on it. Where a board's order is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the board's authority, the order is clearly void and hence subject to collateral attack, and there is no good reason for holding the order binding on the board. Not only will a court refuse to grant mandate to enforce a void order of such a board [citations], but mandate will lie to compel the board to nullify or rescind its void acts. [Citation.] While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do or by making a determination without sufficient evidence. In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction." [FN9]

> FN9 Strangely enough, appellant while challenging the jurisdiction of the Board to take corrective action in the case before us, appears to recognize the inherent inequity of his position and goes out of his way to inform us that he is *not* arguing that a court, rather than the Board, "could not ... have removed [him] from his position pursuant to its general equity jurisdiction."

(10) Appellant's second argument, namely, that his appointment could not be revoked after the expiration of a six months' probationary period, is also without merit. Section 19173 provides: "Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility. ..." Here, appellant was qualified for the position in question because he passed the examination, but he was not eligible to be certified for it; it is not disputed that he ***109** performed satisfactorily up to the time of his dismissal. Therefore, none of the grounds provided in section 19173 were available to the appointing power (Department of General Services) or the Board to dismiss appellant during his probationary period. Nor was section 19173 intended to cure any defect in certification and appointment deriving from violation of the civil service statutes. Appellant's separation from the

position to which he now seeks reinstatement was effectuated under the implied power of the Board to rectify appointments made in violation of the civil service laws. For this reason, provisions for rejection during the probationary period are inapposite here.

It is convenient at this point to observe that *after* the occurrence of the events here involved and *after* the decision of the Court of Appeal in this case, the Legislature at its 1968 regular session enacted Government Code section 19257.5 which provides: "Where the appointment of an employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact which if known to the parties would have rendered the appointment unlawful when made, the board may declare the appointment void from the beginning *if such action is taken within one year after the appointment.*" (Italics added.) (Added by Stats. 1968, ch. 500, § 1; in effect November 13, 1968.) The above section is of course not applicable to the case at bench. We wish to make clear, nevertheless, that our views and holdings in the instant case apply to a situation arising before the enactment of the statute and should not be deemed as derogating from, or otherwise affecting the proper operative effect of, the above statute, particularly the last clause thereof.

(11) Finally, appellant contends that the Board by its own rules was divested of jurisdiction "to accept the appeal" or to take action on April 9, 1965. The point of this argument is that appellant's appointment was made on August 24, 1964. and under the Board's rule 64 "every appeal shall be filed with the board ... within 30 days after the event happened upon which the appeal is based. Upon good cause being shown the board ... may allow such an appeal to be filed within 30 days after the end of the period in which the appeal should have been filed." Therefore, argues appellant, the protest made by the officer of the union on January 4, 1965, was an untimely appeal.

There are two answers. Assuming, that the above rules ***110** governed, we think that any "appeal" to the Board was timely made after the Department of Veterans Affairs on January 19, 1965, formally notified the Board that appellant's veterans' preference had been "removed." Second, and more importantly, we do not believe that it was necesary to file an "appeal" to the Board, which, upon the matter being called to its attention, clearly had jurisdiction to review and correct the initial action taken.

The judgment is affirmed.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Burke, J., concurred.

Cal.,1969.

Ferdig v. State Personnel Bd.

END OF DOCUMENT

58 Cal.App.3d 340
58 Cal.App.3d 340, 129 Cal.Rptr. 824, 22 Wage & Hour Cas. (BNA) 1045
(Cite as: 58 Cal.App.3d 340)

C

CALIFORNIA STATE RESTAURANT ASSOCIATION, Plaintiff and Respondent,
v.
EVELYN E. WHITLOW, as Chief, etc., Defendant and Appellant

Civ. No. 38010.

Court of Appeal, First District, Division 4, California.

May 17, 1976.

SUMMARY

The trial court ordered issuance of a writ of mandate restraining the Chief of the Division of Industrial Welfare, State Department of Industrial Relations, from enforcing a policy of prohibiting an employer from taking a credit against the minimum wage of a restaurant employee for the dollar value of meals furnished, without the specific written consent of the employee. The court held that a minimum wage order promulgated by the Industrial Welfare Commission, then in effect, authorized employers in the restaurant industry to take a credit for meals furnished or reasonably made available to employees without such consent, that the announced policy would constitute an amendment to the order, and that it was therefore beyond the scope of defendant's authority. (Superior Court of the City and County of San Francisco, No. 680041, Ira A. Brown, Jr., Judge.)

The Court of Appeal reversed with directions to the trial court to deny the writ. While the court agreed with the trial court that the wage order permitted an employer to take credit for meals against the minimum wage without the employee's consent, it further held that the order was void as in conflict with the provision of Lab. Code § 450, that no employer shall compel or coerce any employee to patronize his employer, or any other person, in the purchase of anything of value. The court held there was no perceptible practical difference between an "in kind" payment of wages and a "compelled purchase." (Opinion by Caldecott, P. J., with Rattigan and Christian, JJ., concurring.) ***341**

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.
Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies.

(2) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.
In construing a statute or an administrative regulation, a court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the statute or regulation.

(3a, 3b) Labor § 10--Minimum Wage Orders.
A provision of a minimum wage order promulgated by the Industrial Welfare Commission permitting restaurant employers to take a credit for the value of meals furnished employees against the minimum wage otherwise payable, was correctly construed by the trial court as allowing the employer to take the credit without the consent of the employee, where every wage order relating to the restaurant industry during a period of over 20 years had referred to meals furnished by the employer as a part of the minimum wage, and no policy statements during that period made any reference to any requirement of employee consent, where during that period, and for many years prior thereto, it had been the open and recognized practice of restaurant employers to take a meal credit against the minimum wage without employee consent, and where the commission had considered and rejected a proposal that the wage order in question expressly require employee consent.

(4) Statutes § 44--Contemporaneous Administrative Construction.
Contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized.

(5) Statutes § 44--Contemporaneous Administrative Construction--Reenactment of Statute With Established Administrative Construction.
Reenactment of a provision which has a meaning ***342** well-established by administrative construction is persuasive evidence that the intent of the enacting authority was to continue the same construction previously applied.

(6a, 6b) Labor § 10--Minimum Wage Orders--In Kind Payment of Wages as Compelled Purchase.
A provision of a minimum wage order promulgated by the Industrial Welfare Commission permitting restaurant employers to take a credit for the value of meals furnished employees against the minimum wage otherwise payable, construed as permitting the employer to take the credit without the consent of the employee, violates Lab. Code, § 450, which prohibits compelling or coercing an employee "to patronize his employer, or any other person, in the purchase of anything of value." There is no perceptible practical difference between an "in kind" payment of wages and a "compelled purchase," and any implied power the commission might have under Lab. Code, §§ 1182, 1184, to authorize in kind payments must be limited, in harmony with § 450, to situations in which such manner of payment is authorized by specific and prior voluntary employee consent.

[See **Cal.Jur.2d,** Labor, § 24; **Am.Jur.2d,** Labor and Labor Relations, § 1789.]

(7) Administrative Law § 30--Administrative Actions--Effect and Validity of Rules and Regulations--Necessity for Compliance With Enabling Statute.
Administrative bodies and officers have only such powers as have expressly or impliedly been conferred on them by the Constitution or by statute. In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature, and administrative regulations in conflict with applicable statutes are null and void.

(8) Statutes § 28--Construction--Ordinary Language.
In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part.

(9) Statutes § 27--Construction--Liberality--Remedial Statutes.
A remedial statute must be liberally construed so as to effectuate its object and purpose, and to suppress the mischief at which it is directed. ***343**

COUNSEL

Evelle J. Younger, Attorney General, and Gordon Zane, Deputy Attorney General, for Defendant and Appellant.

Hawkins, Cooper, Pecherer & Ludvigson, Daryl R. Hawkins, M. Armon Cooper and Nathan Lane III for Plaintiff and Respondent.

CALDECOTT, P. J.

The issue presented on this appeal is whether Labor Code section 450 prohibits an employer in the restaurant industry from requiring a minimum wage employee to take meals as part of his compensation and have the value of the meals deducted from the minimum wage without the written consent of the employee. We conclude that such action is prohibited.

On August 26, 1974, appellant Evelyn Whitlow, [FN1] as Chief of the Division of Industrial Welfare, Department of Industrial Relations for the State of California, announced her intention to institute a "new policy" regarding certain provisions of the then current minimum wage order of the Industrial Welfare Commission.

FN1 The writ of mandate issued by the trial court was directed to Whitlow, who is hereinafter described as "appellant" although the agency itself is also a named

party and appellant.

Section 4 of Minimum Wage Order No. 1-74 allowed employers in the restaurant industry to take a credit for the value of meals furnished employees against the minimum wage otherwise payable. The "new policy" set forth in a document entitled "Meal Policy for Restaurants Only," inter alia, prohibited a credit against the minimum wage for the dollar value of meals furnished without the *specific written consent of the employee*. It further provided that such consent could be revoked at the beginning of each month. This new policy was based on appellant's determination that the current construction of section 4 of Order No. 1-74 was in violation of section 450 of the Labor Code.

Respondent California State Restaurant Association filed a petition for a writ of mandate to in effect restrain the appellant from putting the "new policy" into operation. The trial court entered judgment granting a ***344** peremptory writ of mandate in favor of respondent. The appeal [FN2] is from the judgment.

> FN2 Appellant in her brief has limited her appeal to that portion of the judgment enjoining enforcement of appellant's "New Policy" of requiring prior revocable employee consent to meal credit deductions from the cash minimum wage.

I

The court below concluded that section 4 of Minimum Wage Order No. 1-74 "authorizes employers in the restaurant industry to take a credit ... for meals furnished or reasonably made available to employees without the specific written consent of such employees to have the value of such specific meals credited by employers against the minimum wage otherwise due the employees ...." Because the appellant's "new policy" would thus constitute an amendment to the order, the court held that it was beyond the scope of her authority, as only the Industrial Welfare Commission has the power to adopt or change a minimum wage order. (Lab. Code, § 1182.)

Appellant contends that the wage order is silent on the issue of consent to meal credit deductions, and that there has been no administrative interpretation of the regulation to the effect that such deductions are authorized in the absence of employee consent. Thus, appellant argues, the policy statement was within the authority of the Division of Industrial Welfare to take all proceedings necessary to enforce minimum wage regulations in accordance with the law, specifically, the prohibitions of Labor Code section 450. (Lab. Code, §§ 59, 61, 1195.)

(1) Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies. (*Cal. Drive-In Restaurant Assn.* v. *Clark*, 22 Cal.2d 287, 292 [140 P.2d 657, 147 A.L.R. 1028]; *Intoximeters, Inc. v. Younger*, 53 Cal.App.3d 262, 270 [125 Cal.Rptr. 864].) The Industrial Welfare Commission acts as a quasi-legislative body in promulgating minimum wage orders. (*Rivera v. Division of Industrial Welfare*, 265 Cal.App.2d 576, 586 [71 Cal.Rptr. 739].) (2) Of course, the cardinal rule of construction is that the court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the statute or regulation. (*East Bay Garbage Co. v. Washington Township Sanitation Co.*, 52 Cal.2d 708, 713 [344 P.2d 289]; *California Sch. Employees Assn. v. Jefferson Elementary Sch. Dist.*, 45 Cal.App.3d 683, 691 [119 Cal.Rptr. 668]; Code Civ. Proc., § 1859.) This rule has been extended to ***345** construction of administrative regulations. (*Cal. Drive-In Restaurant Assn. v. Clark, supra.*)

(3a) Thus, the commission's intent is the most significant factor in interpretation of its wage order. In reaching the conclusion that meal credit deductions without employee consent are authorized by section 4 of order No. 1-74, the trial court properly relied on two additional principles of construction. (4) First, "contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized." (*Rivera v. City of Fresno*, 6 Cal.3d 132, 140 [98 Cal.Rptr. 281, 490 P.2d 793].) (5) Second, reenactment of a provision which has a meaning well-established by administrative construction is persuasive evidence that the intent of the enacting authority was to continue the same construction previously applied. (

Cooper v. Swoap, 11 Cal.3d 856, 868 [115 Cal.Rptr. 1, 524 P.2d 97]; *Cal. M. Express. v. St. Bd. of Equalization*, 133 Cal.App.2d 237, 239-240 [283 P.2d 1063].)

(3b) Appellant urges that there was no administrative construction of the prior wage orders, but only an interpretation by the restaurant industry. The record belies this assertion. Since 1952, every minimum wage order relating to the restaurant industry has specified that "when meals are furnished by the employer *as a part of the minimum wage*, they may not be evaluated in excess of the following [cash equivalents] ...." (Italics added.) Since at least 1944, it has been the open and recognized practice of the restaurant industry for employers to take a meal credit against the minimum wage without employee consent. Division of Industrial Welfare "Policy" statements prior to the appellant's 1974 notice make no reference to any requirement of employee consent. Moreover, the commission considered a proposal that wage order No. 1-74 expressly requires employee consent to such meal credits, but this was written out of the final version of the order. Just as "[t]he sweep of the statute should not be enlarged by insertion of language which the Legislature has overtly left out" (*People v. Brannon*, 32 Cal.App.3d 971, 977 [108 Cal.Rptr. 620]), so the wage order should not be interpreted as including a limitation declined by the commission. In the face of a well-known and documented interpretation and application of the regulation over many years, the commission ratified that construction by reenacting the regulation in substantially the same form, without substantive change. ***346**

This interpretation was thus properly accepted by the trial court as authoritatively intended by the commission in wage order No. 1-74. However, this is not dispositive of the matter, for it is clear that the administrative regulation, as interpreted, must not conflict with applicable state laws; to the extent that it does so conflict, the regulation is void.

II

(6a) Appellant contends that the meal credit provision of order No. 1- 74, as construed, violates Labor Code section 450, which provides: "No employer, or agent or officer thereof, or other person, shall compel or coerce any employee, or applicant for employment, to patronize his employer, or any other person, in the purchase of any thing of value."

Respondent argues that the meal credit provision does not permit an employer to "compel or coerce" an employee to "purchase" a meal within the meaning of section 450, but rather merely authorizes the employer to reduce his *cash* minimum wage obligation by part payment "in kind." Thus, respondent contends, the meal credit against the minimum wage otherwise payable is not a "purchase" within section 450, but is instead a partial fulfillment of the employer's minimum wage obligation; where a meal is provided an employee is not entitled to the higher cash minimum wage. Respondent urges that under Labor Code sections 1182 and 1184, [FN3] the Industrial Welfare Commission has an implied power to authorize in kind payment of wages without employee consent to such manner of payment, and the wage order as construed is a valid exercise of such authority.

FN3 Section 1182 provides in pertinent part:
"After the wage board conference and public hearing, as provided in this chapter, the commission may, upon its own motion or upon petition, fix:
"(a) A minimum wage to be paid to employees engaged in any occupation, trade, or industry in this state, which shall not be less than a wage adequate to supply the necessary costs of proper living to, and maintain the health and welfare of such employees."
Section 1184 provides: "After an order has been promulgated by the commission making wages ... mandatory in any occupation, trade, or industry, the commission may at any time upon its own motion, or upon petition of employers or employees reconsider such order for the purpose of altering, amending, or rescinding such order or any portion thereof. For this purpose the commission shall proceed in the same manner as prescribed for an original order. Such altered or amended order shall have the same effect as the original order."

(7) Administrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the Constitution or ***347** by statute. (*Ferdig v. State Personnel Bd.*, 71 Cal.2d 96, 103 [77 Cal.Rptr. 224, 453 P.2d 728].) In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature. Administrative regulations in conflict with applicable statutes are null and void. (*Harris* v. *Alcoholic Bev. Etc. Appeals Bd.*, 228 Cal.App.2d 1, 6 [39 Cal.Rptr. 192]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86].)

Certain additional principles of construction are helpful to resolution of this controversy. (8) In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part. (*Anaheim Union Water Co. v. Franchise Tax Bd.*, 26 Cal.App.3d 95, 106 [102 Cal.Rptr. 692].) (9) A remedial statute must be liberally construed so as to effectuate its object and purpose, and to suppress the mischief at which it is directed. (*City of San Jose v. Forsythe*, 261 Cal.App.2d 114, 117 [67 Cal.Rptr. 754]; *Lande v. Jurisich*, 59 Cal.App.2d 613, 616-617 [139 P.2d 657].)

(6b) Section 450 manifests a legislative intent to protect wage earners against employer coercion to purchase products or services from the employer. In the context of the present case, that section is plainly part of "the established policy of our Legislature of protecting and promoting the right of a wage earner to all wages lawfully accrued to him." (*City of Ukiah v. Fones*, 64 Cal.2d 104, 108 [48 Cal.Rptr. 865, 410 P.2d 369].) The Legislature evidently determined "that the evil thus to be guarded against was sufficiently prevalent to require legislative action, and the remedy ought not to be defeated by judicial construction if that result can reasonably be avoided." (*Lande v. Jurisich, supra*, 59 Cal.App.2d at p. 617.)

While it may be argued that "in kind" payment of wages is not technically or narrowly speaking a "compelled purchase," there is no perceptible practical difference between the two. Where an employee is not allowed the choice between cash and in kind payment, but rather is forced to accept goods or services from his employer in lieu of cash as part of the minimum wage, the same mathematical result obtains as if the employer had paid the wages in cash with the condition that the employee spend with the employer an amount equal to the allowable credit (here, on a meal) at the end of each shift. This latter practice unquestionably violates section 450. Employers cannot be permitted to evade the salutary objectives of the statute by indirection. ***348**

Moreover, sections 1182 and 1184, urged by respondent in support of its contentions, are similarly subject to the rule of liberal construction of remedial legislation. (*California Grape etc. League* v. *Industrial Welfare Com.*, 268 Cal.App.2d 692, 698 [74 Cal.Rptr. 313].) Additionally, the statutes must be construed in harmony with section 450, so as to carry out the fundamental legislative purposes of the whole act. (*Earl Ranch, Ltd. v. Industrial Acc. Com.*, 4 Cal.2d 767, 769 [53 P.2d 154]; *Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) In light of the prohibition against compelled purchases in section 450, the implied power of the commission to authorize in kind payments must be limited to situations in which such manner of payment is authorized by specific and prior voluntary employee consent. This limitation is consistent with the strong public policy favoring full payment of minimum wages, which the Legislature has effectuated by making payment of less than the minimum wage unlawful. (Lab. Code, § 1197.)

The judgment is reversed with directions to the trial court to deny the petition for writ of mandate.

Rattigan, J., and Christian, J., concurred.

A petition for a rehearing was denied June 16, 1976, and respondent's petition for a hearing by the Supreme Court was denied July 15, 1976. ***349**

Cal.App.1.Dist.,1976.

California State Restaurant Ass'n v. Whitlow

END OF DOCUMENT

38 Cal.3d 100
38 Cal.3d 100, 695 P.2d 220, 211 Cal.Rptr. 133
(Cite as: 38 Cal.3d 100)

HUNTINGTON PARK REDEVELOPMENT AGENCY, Petitioner,
v.
MICHAEL A. MARTIN, as Secretary, etc., Respondent

L.A. No. 31861.

Supreme Court of California

Feb 28, 1985.

SUMMARY

A redevelopment agency adopted an ordinance imposing a sales and use tax of 1 percent in conformity with Rev. & Tax. Code, §§ 7202.5, 7202.6 (authorizing such a tax if the agency operates in a city that will give credit against its own sales and use tax for taxes paid to the agency). The secretary of the redevelopment agency refused to publish the ordinance on the ground that it violated Cal. Const., art. XIII A, § 4, and art. XIII B. The agency filed a petition for a writ of mandate in the Supreme Court to compel the secretary to publish the ordinance. The court issued the writ of mandate as prayed. The court held that a redevelopment agency is not a "special district" within the meaning of art. XIII A, § 4, which requires a two-thirds vote of the electorate for imposition of special taxes by a county, city, or special district, because it does not have the power to levy taxes. Accordingly, the ordinance adopted by the agency did not violate art. XIII A, § 4. The court also held that the ordinance did not violate art. XIII B, which limits appropriations of state and local governments to the past year's level, because there was a transfer of financial responsibility from the city to the redevelopment agency within the meaning of Cal. Const., art. XIII B, § 3, subd. (a), which permits the transferor and transferee agencies to adjust their respective appropriation limits "for the year in which such transfer becomes effective," and Health & Saf. Code, § 33678, which provides that if any law giving a redevelopment agency the power to tax is enacted without a vote of the electorate, the exercise of that taxing power will be deemed a "transfer of financial responsibility" under art. XIIIB, § 3, subd. (a). Although the transfer of responsibility for eliminating urban blight took place prior to the enactment of the ordinance, the redevelopment scheme in California envisions not a static transfer of responsibility, but an ongoing balance of agency action and city oversight and participation. Thus, there is a constant transfer of "financial responsibility for providing services." (Opinion by Mosk, J., with Bird, C. J., Kaus, Broussard, Reynoso and Grodin, JJ., concurring. Separate concurring and dissenting opinion by Lucas, J.) ***101**

HEADNOTES

Classified to California Digest of Official Reports

(1) Public Housing and Redevelopment § 5--Urban Renewal Projects-- Redevelopment Agencies.
Redevelopment agencies are governed by the Community Redevelopment Law. (Health & Saf. Code, § 33000 et seq.). As arms of local legislative bodies, they act on the local level to eradicate blighted areas. To accomplish this goal, these agencies utilize tax-increment financing, authorized by Cal. Const., art. XVI, § 16. Under this scheme, the agency borrows funds and issues bonds to finance a project. The intent is that on completion of the project the property values in the area-and hence property tax revenues-will increase. These increased revenues are allocated between the agency and the taxing entity, the agency receiving only those revenues necessary to pay the costs of redevelopment, including repayment on the bonds.

(2) Property Taxes § 7.5--Constitutional Provisions; Statutes and Ordinances--Real Property Tax Limitation--Two-thirds Vote Requirement for Imposition of Special Taxes.
Although Cal. Const., art. XIII A, § 4, which provides that "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such

district, may impose special taxes on such district," appears to be a grant of power allowing local entities to enact special taxes, it actually has the effect of limiting their enactment. While a majority of the voters may favor a proposal, they are likely to be thwarted by the requirement of obtaining a two-thirds vote. The section is part of the interlocking package of sections in art. XIII A, deemed necessary by the initiative's framers to assure effective real property tax relief, and its purpose is to prevent the government from recouping its losses from decreased property taxes by imposing or increasing other taxes.

(3a, 3b) Public Housing and Redevelopment § 5--Urban Renewal Projects-- Sales and Use Tax Enacted by Redevelopment Agency--Validity--Constitutional Property Tax Limitations.
A redevelopment agency is not a "special district" within the meaning of Cal. Const., art. XIII A, § 4, which requires a two-thirds vote for imposition of special taxes, since it does not have the power to levy taxes. Redevelopment agencies are neither empowered to, nor do they in fact, levy property taxes; the county tax collector collects all such taxes. (Rev. & Tax. Code, § 2606.) The constitutional and statutory scheme for financing redevelopment agencies-tax-increment financing (***102**Cal. Const., art. XVI, § 16, implemented by Health & Saf. Code, § 33670)-clearly establishes that redevelopment agencies passively receive the revenue from taxes levied by other agencies. Accordingly, an ordinance adopted by a redevelopment agency imposing a 1 percent sales and use tax pursuant to Rev. & Tax. Code, §§ 7202.5, 7202.6 (authorizing such a tax if the agency operates in a city that will give credit against its own sales and use tax for taxes paid to the agency) did not violate art. XIII A, § 4.

[See **Cal.Jur.3d,** Public Housing, § 37; **Am.Jur.2d,** Housing Laws and Urban Redevelopment, § 27.]

(4a, 4b) Property Taxes § 7.5--Constitutional Provisions; Statutes and Ordinances--Real Property Tax Limitation--Two-thirds Vote Requirements for Special Taxes--Meaning of Term "Special District."
Under Cal. Const., art. XIII A, § 4, which permits cities, counties, and special districts, by a two-thirds vote, to impose special taxes on such district, a "special district" is one which may levy a tax on real property. For purposes of § 4, the "levying" of a tax must mean just that: the imposition and collection of the tax.

(5a, 5b, 5c) Public Housing and Redevelopment § 5--Urban Renewal Projects--Sales and Use Tax Enacted by Redevelopment Agency--Validity--Constitutional Appropriations Limit.
An ordinance adopted by a redevelopment agency imposing a 1 percent sales and use tax in compliance with Rev. & Tax. Code, §§ 7202.5, 7202.6 (authorizing such a tax if the agency operates in a city that will give credit against its own sales and use tax for taxes paid to the agency) did not violate Cal. Const., art. XIII B (limiting appropriations of state and local governments to the past year's level). There was a "transfer of financial responsibility" from the city to the redevelopment agency within the meaning of Cal. Const., art. XIII B, § 3, subd. (a), which permits the transferor and transferee agencies to adjust their respective appropriation limits "for the year in which such transfer becomes effective," and Health & Saf. Code, § 33678, which provides that if any law giving a redevelopment agency the power to tax is enacted without a vote of the electorate, the exercise of that taxing power will be deemed a "transfer of financial responsibility" within the meaning of § 3, subd. (a). Although the transfer from the city to the redevelopment agency of responsibility for eliminating urban blight took place prior to the enactment of the ordinance, the redevelopment scheme in California envisions not a static transfer of responsibility, but an ongoing balance of agency action and city oversight and participation. Thus, ***103** there is a constant transfer of "financial responsibility for providing services."

(6) Constitutional Law § 16--Construction of Constitutions--Construction by Legislature.
Where the Legislature has enacted a law in light of a particular constitutional provision, the Legislature's interpretation of uncertain constitutional terms is entitled to great deference by the courts.

(7) Public Housing and Redevelopment § 5--Urban Renewal Projects.
Elimination of urban blight is a governmental function.

(8) Property Taxes § 7.5--Constitutional Provisions; Statutes and Ordinances--Real Property Tax Limitation--Limitations on Appropriations.
The goals of Proposition 4, which became Cal. Const., art. XIII B, were the protection of taxpayers from excessive taxation, and the imposition of a thoughtfully drafted spending limit on government. The initiative was thus aimed against excessive taxation and government spending.

COUNSEL

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Charles R. Martin for Respondent.

MOSK, J.

This is a petition for writ of mandate to compel respondent Martin, Secretary of the Huntington Park Redevelopment Agency (the ***104** Agency), to publish an ordinance adopted by the Agency on August 24, 1982. The ordinance would allow the Agency to levy a sales and use tax. Martin refused to publish the ordinance on the ground that it assertedly violates section 4 of article XIII A, and article XIII B, of the California Constitution.

(1) Redevelopment agencies are governed by the Community Redevelopment Law. (Health & Saf. Code, § 33000 et seq.) As arms of local legislative bodies, they act on the local level to eradicate blighted areas. To accomplish this goal, these agencies utilize tax-increment financing, authorized by article XVI, section 16, of the Constitution. Under this scheme, the agency borrows funds and issues bonds to finance a project. The intent is that on completion of the project the property values in the area - and hence property tax revenues - will increase. These increased revenues are allocated between the agency and the taxing entity, the agency receiving only those revenues necessary to pay the costs of redevelopment, including repayment on the bonds. (*Redevelopment Agency v. County of San Bernardino* (1978) 21 Cal.3d 255, 257, 266 [145 Cal.Rptr. 886, 578 P.2d 133].)

In 1981 the Legislature enacted Senate Bill No. 152 (SB 152). (Stats. 1981, ch. 951, p. 3622.) By means of amendments and additions to the Revenue and Taxation Code and the Community Redevelopment Law, SB 152 provides redevelopment agencies with an additional mode of financing. A redevelopment agency may now impose a sales and use tax of 1 percent or less on retail sales and use of personal property, if the agency operates in a city that will give credit against its own sales and use tax for taxes paid to the agency. (Rev. & Tax. Code, §§ 7202.5, 7202.6.) Thus the burden on taxpayers will not increase, because they will obtain a dollar-for-dollar credit against their city taxes for any sums paid to such an agency. An agency is authorized to issue bonds to be paid off from the proceeds of this sales and use tax. (Health & Saf. Code, § 33641, subd. (d).)

On August 24, 1982, the Agency adopted an ordinance (the Ordinance) imposing a sales and use tax of 1 percent in conformity with SB 152. On the same day, the City of Huntington Park (the City) amended its municipal code to provide a tax credit against its sales and use taxes for any taxes paid to the Agency under the Ordinance. The tax will not become operative until the Ordinance is published. (Gov. Code, § 36933, subd. (b).) Respondent Martin has refused to publish the Ordinance, although it is his statutory duty to do so. (Rev. & Tax. Code, § 7202.6, subd. (b); Gov. Code, § 36933, subd. (a).)

The issues we confront are two: whether the Ordinance violates section 4 of article XIII A of the Constitution (requiring "special taxes" to be approved ***105** by two-thirds of the electors before they may be imposed); and whether the Ordinance violates article XIII B of the Constitution (limiting appropriations of the state and local governments to the past year's level). We conclude that the Ordinance does not fall within article XIII A

because the Agency is not a "special district." Nor does the Ordinance violate article XIII B, as there has been a transfer of "the financial responsibility of providing services" from the City to the Agency, and thus the City and the Agency may adjust their appropriations limit accordingly.

I. *The Challenge Under Article XIII A*

(2) Article XIII A of the Constitution is the product of Proposition 13, a 1978 initiative aimed at reducing property taxes. Section 4 of that article provides that "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district ...." Although this section appears to be a grant of power allowing local entities to enact special taxes, it actually has the effect of limiting their enactment (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 53 [184 Cal.Rptr. 713, 648 P.2d 935]). While a majority of the voters may favor a proposal, they are likely to be thwarted by the requirement of attaining a two-thirds vote. The section is part of the "interlocking ' package"" of sections in article XIII A, "deemed necessary by the initiative's framers to assure effective real property tax relief." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231 [149 Cal.Rptr. 239, 583 P.2d 1281].) The purpose of section 4 is to prevent the government from recouping its losses from decreased property taxes by imposing or increasing other taxes. (*Ibid.*)

(3a) The Agency contends that the Ordinance does not violate section 4 even though it was not submitted to the voters for a two-thirds approval. First, the Agency contends it is not "imposing" a tax: because the taxpayers will have no additional tax burden, there is merely a transfer of tax revenues from one governmental entity to another. Second, the levy here is not a "special tax," as it is to be used for general redevelopment purposes. (See *City and County of San Francisco v. Farrell, supra*, 32 Cal.3d at p. 57.) Third, the Agency is not a "special district," as it does not have the power to levy a property tax. (See *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 205 [182 Cal.Rptr. 324, 643 P.2d 941].) We need consider only the last of these contentions, for as respondent concedes, an adverse holding on any of these grounds is fatal to his reliance on article XIII A. (See 31 Cal.3d at pp. 201-202: "if that term ["special district"] does not encompass [petitioner], the two-thirds requirement is ***106** inapplicable to the sales tax in issue here even if it is a ' special tax' within the meaning of the section.")

Section 4 applies to special taxes levied by "Cities, Counties and special districts." The Agency is not a city or county, and thus it will fall within section 4 only if it is a special district. (4a) We considered the meaning of the term "special district" in *Richmond.* Reasoning that section 4 was ambiguous, and "[i]n view of the fundamentally undemocratic nature of the requirement for an extraordinary majority," we concluded that "the language of section 4 must be strictly construed and ambiguities resolved in favor of permitting voters of cities, counties and 'special districts' to enact 'special taxes' by a majority rather than a two-thirds vote." (*Id.* at p. 205.) We therefore held that a special district for the purpose of section 4 is one "which may levy a tax on real property." (*Ibid.*)

(3b) Redevelopment agencies are not empowered by law to levy property taxes; the tax collector of the county collects all such taxes. (Rev. & Tax. Code, § 2602.) Nor do redevelopment agencies in fact levy property taxes. Tax-increment financing uses taxes levied not by redevelopment agencies, but "levied and collected as other taxes are levied and collected by the respective taxing agencies." (Cal. Const., art. XVI, § 16.) Health and Safety Code section 33670, implementing and echoing the language of the latter provision, defines "taxing agencies" as "the State of California, any city, county, city and county, district, or other public corporation," and discusses allocation of revenues between these agencies on the one hand, and redevelopment agencies on the other. [FN1] Clearly, the scheme establishes ***107** that redevelopment agencies passively receive the revenue from taxes levied by other agencies.

> FN1 Section 33670 provides that the taxes levied are to be divided as follows: "(a) *That portion of the taxes which would be produced by the rate upon which the tax is levied* each year by or for each of the taxing agencies upon the total sum of the assessed value of the taxable property in the redevelopment project as shown upon

> the assessment roll used in connection with the taxation of such property by such taxing agency, last equalized prior to the effective date of such ordinance, *shall be allocated to and when collected shall be paid to the respective taxing agencies* as taxes by or for said taxing agencies on all other property are paid (for the purpose of allocating taxes levied by or for any taxing agency or agencies which did not include the territory in a redevelopment project on the effective date of such ordinance but to which such territory has been annexed or otherwise included after such effective date, the assessment roll of the county last equalized on the effective date of the ordinance shall be used in determining the assessed valuation of the taxable property in the project on the effective date); and
> "(b) *That portion of the levied taxes each year in excess of such amount shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency* to pay the principal of and interest on loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed, or otherwise) incurred by such redevelopment agency to finance or refinance, in whole or in part, such redevelopment project. Unless and until the total assessed valuation of the taxable property in a redevelopment project exceeds the total assessed value of the taxable property in such project as shown by the last equalized assessment roll referred to in subdivision (a), all of the taxes levied and collected upon the taxable property in such redevelopment project shall be paid to the respective taxing agencies. When such loans, advances, and indebtedness, if any, and interest thereon, have been paid, all moneys thereafter received from taxes upon the taxable property in such redevelopment project shall be paid to the respective taxing agencies as taxes on all other property are paid." (Italics added.)

Respondent urges a different interpretation. While he acknowledges that a redevelopment agency does not have the power to levy taxes on real property, he contends that the agencies' indirect participation in the taxing process makes them "special districts": Although the agencies do not impose the taxes themselves, they receive a share of the taxes imposed - thus, they indirectly levy.

The argument is untenable. As explained in *Richmond*, we read section 4 narrowly because it impinges on the democratic process. (31 Cal.3d at p. 205.) To conclude that the "levying" of property taxes includes the passive receipt of revenues from such taxes is an expansion of that concept directly at odds with our mandated narrow reading of section 4. (4b) For purposes of section 4, the "levying" of a tax must mean just that: the imposition and collection of the tax. [FN2]

> FN2 In addition, section 11 of SB 152 provides that "the State Board of Equalization shall not administer any sales tax imposed by a redevelopment agency pursuant to this act unless and until an appellate court makes a determination which is final on the merits that such a tax is not a ' special tax' within the meaning of Section 4 of Article XIII A of the California Constitution." Because we hold the Agency not to be a "special district," and thus not within the scope of section 4, such a determination need not be made in this case.

II. *The Challenge Under Article XIII B*

Article XIII B of the Constitution was the result of Proposition 4, a 1979 initiative. Section 1 of that article provides that "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year ...." Section 8, subdivision (b), defines "appropriations subject to limitation" of an entity of local government as "any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity ...." Subdivision (c) of the same section defines "proceeds of taxes" to include revenues from licence and user fees in excess of the costs of regulation, investment of tax revenues, and subventions received by the local government from the state. Thus, a governmental entity may not spend more in one year on a program

funded with the proceeds of taxes than it did in the prior year. ***108**

The Agency asserts, and respondent concedes, that it does not have an annual appropriations limit, because the revenues from tax-increment financing are not "proceeds of taxes" for the purposes of article XIII B. [FN3] The Agency concedes that the revenues raised by the Ordinance are the "proceeds of taxes." Since the Agency has no appropriations limit, any spending of the revenues it receives through the Ordinance could be in violation of article XIII B.

> FN3 Health and Safety Code section 33678, subdivision (a), declares the proceeds received from tax-increment financing to be outside article XIII B. We need not decide the validity of this section, as tax-increment financing is not at issue here, and we find there is a "transfer of financial responsibility" within the meaning of section 33678 and article XIII B, section 3, subdivision (a), discussed below. For the same reasons, we find it unnecessary to consider whether article XIII B applies to redevelopment agencies.

(5a) Section 3, subdivision (a), of article XIII B provides that if "the financial responsibility of providing services is transferred ... from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount." The Agency urges us to hold that such a transfer has taken place in the present case. Respondent concedes that if such a transfer has taken place article XIII B will not be violated, but insists that nothing has been transferred here but the power to tax.

(6) "Where the Legislature has enacted a law in light of a particular constitutional provision, a settled rule of construction is that the Legislature's interpretation of uncertain constitutional terms is entitled to great deference by the courts." (*Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662 [166 Cal.Rptr. 674].) (5b) Health and Safety Code section 33678 was enacted in the first legislative session following the adoption of article XIII B. It provides in part that if any law giving a redevelopment agency the power to tax is enacted without a vote of the electorate, the exercise of that taxing power will be deemed a "transfer of financial responsibility" within the meaning of section 3, subdivision (a). SB 152, section 3, subdivision (c), provides that the taxing power it creates in redevelopment agencies is such a transfer. [FN4]

> FN4 Section 3, subdivision (c), was repealed effective January 1, 1984, before the Ordinance was enacted. (Stats. 1981, ch. 951, § 9, p. 3629.)

That this transfer is consistent with article XIII B, section 3, subdivision (a), is easily demonstrated. (7) It is well recognized that elimination of urban blight is a governmental function. (***109***Pacific Tel. & Tel. Co. v. Redevelopment Agency* (1977) 75 Cal.App.3d 957, 969 [142 Cal.Rptr. 584]; Health & Saf. Code, § 33750.) (5c) In California, the Community Redevelopment Law recites specifically that it is a state policy to cure blighted areas. (*Id.*, § 33037.) Redevelopment agencies are created to fulfill this governmental function. (*Id.*, § 33703.) Thus, there is a transfer, in Huntington Park as elsewhere, from the City to the Agency of the City's responsibility for providing the service of eradicating urban blight.

Article XIII B, section 3, subdivision (a), allows a shifting of appropriations limits for the year in which the transfer becomes effective. It is true that the transfer here took place prior to the enactment of the Ordinance. However, the redevelopment scheme in California envisions not a static transfer of responsibility, but an ongoing balance of agency action and city oversight and participation. A city may create a redevelopment agency to perform the service of eradicating blight (Health & Saf. Code, § 33101), it may retain the power itself (*id.*, § 33200), or it may have a combination of both working together (*id.*, § 33210). The city has continuing control over the existence of the agency: the city must create the agency (*id.*, § 33101), may dissolve the agency (*id.*, § 33141), and must approve of the agency's plans (*id.*, § 33360). The agency partially funds the redevelopment. For example, Health and Safety Code section 33750 provides that "it is

necessary and essential that redevelopment agencies be authorized to make long-term, low-interest loans through qualified mortgage lenders to finance residential construction in order to encourage investment and upgrade redevelopment project areas and increase the supply of housing. Unless redevelopment agencies intervene to generate mortgage funds and to provide some form of assistance to finance residential construction, many redevelopment areas will stagnate and deteriorate because owners and investors are not able to obtain loans from private sources. [¶] The Legislature further finds and declares that financing of rehabilitation ... serves an essential public purpose for the economic renewal of our cities." Thus, there is a constant transfer of "financial responsibility for providing services." Here SB 152, and the Ordinance passed in conformity therewith, facilitate the flow of responsibility from the City to the Agency. The City may therefore pass a portion of its appropriations limit to the Agency in accordance with article XIII B, section 3, subdivision (a).

(8) This conclusion is further supported by analysis of the Ordinance in light of the purposes of article XIII B. Proposition 4, which became article XIII B, was billed by its supporters as the "Spirit of 13" (referring to Prop. 13, which had been adopted a year earlier as art. XIII A). Its goals were the "protection for taxpayers from excessive taxation," and the imposition of a "thoughtfully drafted spending limit" on government. (Ballot Pamp., ***110** Proposed Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) The initiative was thus aimed against excessive taxation and government spending. (*County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232].)

But neither of these concerns is implicated here. A person will not pay increased sales and use taxes under an ordinance enacted pursuant to SB 152, as an agency may adopt such an ordinance only if the city in which it operates provides a dollar-for-dollar credit against its own sales and use tax. And government spending will not increase, as the city must adjust its appropriations limit downward in proportion to the agency's upward adjustment under article XIII B, section 3, subdivision (a).

Let the writ of mandate issue as prayed.

Bird, C. J., Kaus, J., Broussard, J., Reynoso, J., and Grodin, J., concurred.

LUCAS, J.,

Concurring and Dissenting.

I concur with part I of the majority opinion. I do so reluctantly under compulsion of our holding in *Los Angeles County Transportation Com.* v. *Richmond* (1982) 31 Cal.3d 197 [182 Cal.Rptr. 324, 643 P.2d 941]. That case, in my view, was wrongly decided; I agree with Justice Richardson's dissent. (See *Richmond* at p. 209.)

I dissent from part II of the majority opinion and from the judgment. When one governmental entity shifts to another the financial responsibility for providing services, the California Constitution permits an apportionment of the transferor's appropriations limit. This apportionment attaches "for the year in which such transfer becomes effective." (Cal. Const., art. XIII B, § 3, subd. (a).) The obvious triggering event for shifting the appropriations limit is the transfer of financial responsibility. It is just as obvious that where there has been no shift in financial responsibility, no apportionment of appropriations limit is allowed.

The majority finds that these strictures are satisfied because the financial responsibility for ending urban blight is constantly transferred to the agency. (*Ante*, p. 109.) I cannot agree. As the majority notes, the financial responsibility for eradicating blight was first transferred from the City of Huntington Park to the agency long ago. (*Ante*, p. 109.) Neither Senate Bill No. 152 (Stats. 1981, ch. 951) nor the city's ordinance shifts any new financial responsibility to the agency. ***111**

All that Senate Bill No. 152 and the city's ordinance have effected is an alternative means of financing services for which the agency *already* has financial responsibility. In my opinion, that is insufficient under the plain language of our Constitution to allow the city to shift part of its appropriations limit to the agency.

Accordingly, I would find that Senate Bill No. 152

and the ordinance improperly allow the agency to exceed its "total annual appropriations subject to limitation" under article XIII B, section 1, of the California Constitution and are thus unconstitutional.

I would deny the writ. ***112**

Cal.,1985.

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65 Ops. Cal. Atty. Gen. 618
65 Ops. Cal. Atty. Gen. 618, 1982 WL 156003 (Cal.A.G.)
(Cite as: 1982 WL 156003 (Cal.A.G.))

C

Office of the Attorney General
State of California

***1** Opinion No. 82-301
December 23, 1982

THE HONORABLE NEWTON R. RUSSELL
MEMBER OF THE CALIFORNIA STATE ASSEMBLY

THE HONORABLE NEWTON R. RUSSELL, MEMBER OF THE CALIFORNIA STATE ASSEMBLY, has requested an opinion on the following questions:

1. Do the provisions of Penal Code section 1463 govern the distribution of fines resulting from the issuance of parking citations and the making of arrests by airport security officers at the Burbank-Glendale-Pasadena Airport?

2. Would the fines be distributable pursuant to the provisions of Penal Code section 1463 if the Chief of the Burbank Police Department 'deputized' the security officers?

3. Do the airport security officers have peace officer status while off duty and not involved in law enforcement activities relating to the Burbank-Glendale-Pasadena Airport?

CONCLUSIONS

1. The provisions of Penal Code section 1463 do not govern the distribution of fines resulting from the issuance of parking citations and the making of arrests by airport security officers at the Burbank-Glendale-Pasadena Airport except where the airport authority itself processes the parking violation fines or contracts for such services.

2. The fines would not be distributable pursuant to the provisions of Penal Code section 1463 (except where the airport authority itself processes the parking violation fines or contracts for such services) even if the Chief of the Burbank Police Department 'deputized' the security officers.

3. The airport security officers do not have peace officer status while off duty and not involved in law enforcement activities relating to the Burbank-Glendale-Pasadena Airport.

ANALYSIS

The Burbank-Blendale-Pasadena Airport is located in the City of Burbank and is operated under a 'joint powers' agreement [FN1] between the cities of Burbank, Glendale, and Pasadena. An agency (hereafter 'airport authority') exercises the powers of the cities under the agreement, including the employment of security officers for law enforcement activities.

The questions presented for analysis concern certain consequences resulting from the employment of the security officers by the airport authority.

1. Distribution of Fines

The first question to be resolved is whether the distribution of fines resulting from the issuance of parking citations and the making of arrests by the airport security officers are governed by the provisions of Penal Code section 1463 . [FN2] We conclude that only the limited provisions of subdivision (3) of the statute would be applicable to the facts presented.

Section 1463 provides:

'Except as otherwise specifically provided by law:

'(1) All fines and forfeitures including Vehicle Code fines and forfeitures collected upon conviction or upon the forfeiture of bail, together with moneys deposited as bail, in any municipal court or justice court, shall, as soon as practicable after the receipt thereof, be deposited with the county treasurer of the county in which such court is situated. The moneys so deposited shall be distributed as follows:

***2** '(a) Once a month there shall be transferred into the proper funds of the county an amount equal to the fines and forfeitures collected during the preceding month upon the conviction or upon the forfeiture of bail following arrests made by officers or other persons employed by the state or by the county in which such court is situated, exclusive of fines or forfeitures or forfeitures of bail collected from any person arrested by a state officer and charged with the commission of a misdemeanor under the Vehicle Code within the limits of a city within the county.

'(b) Except as otherwise provided in this subdivision, once a month there shall be transferred into the traffic safety fund of each city in the county an amount equal to 50 percent of all fines and forfeitures collected during the preceding month upon the conviction or upon the forfeiture of bail from any person arrested by a state officer and charged with the commission of a misdemeanor under the Vehicle Code within that city, and an amount equal to the remaining 50 percent shall be transferred to the special road fund of the county; provided, however, that the board of supervisors of the county may, by resolution, provide that not more than 50 percent of the amount to be transferred to the special road fund of the county, be transferred into the general fund of the county.

'Once a month there shall be transferred into the general fund of the county an amount equal to that percentage of the fines and forfeitures collected during the preceding month upon the conviction or upon the forefeiture of bail from any person arrested by a state officer and charged with the commission of a misdemeanor under the Vehicle Code on state highways constructed as freeways whereon city police officers enforced the provisions of the Vehicle Code on April 1, 1965, within the limits of a city within the county which is set forth in the schedule appearing in subparagraph (c) of this paragraph (1). If this paragraph is

applicable within a city, it shall apply uniformly throughout the city to all freeways regardless of the date of freeway construction or completion.
'(c) Once a month there shall be transferred into the general fund of the county an amount equal to that percentage of the fines and forfeitures collected during the preceding month upon conviction or upon the forfeiture of bail following arrests made by officers or other persons employed by each city in the county which is set forth in the following schedule:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

County percentage 11
'. . . .
'In any county for which a county percentage is set forth in the above schedule and which contains a city which is not listed or which is hereafter created, there shall be transferred to the county general fund the county percentage. In any county for which no county percentage is set forth, and in which a city is hereafter created, there shall be transferred to the county general fund 15 percent.
***3** 'A county and city therein may, by mutual agreement, adjust the percentages herein.
'(d) Once a month there shall be transferred to each city in the county an amount equal to the total sum remaining after the transfers provided for in subparagraphs (b) and (c) above have been made of the fines and forfeitures collected during the preceding month upon conviction or upon the forfeiture of bail following arrests made by officers or other persons employed by such city or arrests made by state officers for misdemeanor violations of the Vehicle Code.
'. . . .
'(3) Notwithstanding any other provision of law, in the event that a county or court elects to discontinue processing the posting of bail for an issuing agency, the city, district or other issuing agency may elect to receive, deposit, accept forfeitures and otherwise process the posting of bail for parking violations for which such city, district, or other issuing agency has issued a written notice of parking violation pursuant to Section 41103 of the Vehicle Code. Notwithstanding paragraph (1), if the city, district, or other issuing agency processes such posting of bail, the issuing agency may retain the forfeited bail collected.
'For the purposes of this subdivision, neither the California Highway Patrol, nor a sheriff's office when acting on a contract basis for a city, shall be deemed an 'issuing agency'.
'The issuing agency may elect to contract with the county, a municipal or justice court, or another issuing agency within the county to provide for the processing of the posting of bail for such parking violations.
'No provision of this section shall be construed to require any county or municipal or justice court to process the posting of bail for a city, district or other issuing agency prior to the filing of a complaint. If a county or court has been processing the posting of bail for an issuing agency, and if the county or court elects to terminate the processing of the posting of bail the issuing agency and the county or court shall reach agreement for the transfer of the processing activity. The agreement shall permit the county or court to phase out, and the issuing agency to phase in, personnel, equipment, and facilities that may have been acquired or need to be acquired in contemplation of a long-term commitment to process the posting of bail for the issuing agency's parking violations.'

(Emphases added.) [FN3]

Besides the comprehensive language of section 1463, the Legislature has made particular provision for the California State University and Colleges (§ 1463.5a), the University of California (§ 1463.6), community service districts (§ 1463.10), transit districts (§ 1463.11), school districts (§ 1463.12), port districts (§ 1463.13), and the San Diego Metropolitan Transit District (§ 1463.19). While these specific provisions would govern over the more general provisions of section 1463 where both would otherwise be applicable, an airport operated under a joint powers agreement would not come within their express terms. Hence, if any statutory language concerning fine distributions is applicable to a joint powers airport, it must be section 1463.

***4** As can readily be observed, the provisions of section 1463 are complex and interrelated. They have been examined numerous times by the judiciary (see County of Los Angeles v. City of Alhambra (1980) 27 Cal.3d 184; City of Dan Diego v. Municipal Court (1980) 102 Cal.App.3d 775; Board of Trustees v. Municipal Court, supra, 95 Cal.App.3d 322) and this office (see 63 Ops.Cal.Atty.Gen. 888 (1980); 55 Ops.Cal.Atty.Gen. 256 (1972); 53 Ops.Cal.Atty.Gen. 29 (1970); 34 Ops.Cal.Atty.Gen. 283 (1959); 25 Ops.Cal.Atty.Gen. 122 (1955)). The Legislature, however, has often amended the statute, and none of the above-cited authorities have considered the language and question now at issue.

The critical aspects of section 1463 are: (1) where did the arrest or notification [FN4] take place, (2) who is the employer of the person who made the arrest or notification, and (3) what public entity is processing the fine payment.

In the factual situation presented for analysis, the arrest or notification occurs in the City of Burbank, and the employer of the person who makes the arrest or notification is the airport authority.

The easiest situation to dispose of is where the airport authority processes the parking violation fines under section 1463, subdivision (3). [FN5] It 'may retain the forfeited bail collected' without distribution to any other agency in such situation. Subdivision (3) also authorizes the issuing agency to contract with some other agency to process the parking violation fines; the contract provisions would then govern the distribution of fines collected.

Where subdivision (3) is inapplicable (e.g., in all nonparking violation situations), we look to the provisions of subdivision (1). Here, we find an apparent hiatus. Subdivision (1) initially places the fines 'with the county treasurer of the county' but not into any particular county fund. Distribution to a specific county fund (or city fund) depends upon whether the person is arrested or notified by an employee of the state (subds. (1)(a), (1)(b), (1)(d)), an employee of the county (subd. (1)(a)), or an employee of a city (subds. (1)(c), (1)(d)). [FN6]

Is a person hired by an airport authority under a joint powers agreement an employee of the state, a county, or a city? We believe not.

First, Government Code section 6507 states that an agency created to exercise

joint powers on behalf of public agencies 'is a public entity separate from the parties to the agreement.' Accordingly, even though here the airport authority was initially created by three cities, it is not legally considered to be the same entity as its contracting parties. [FN7]

Second, the Legislature has found it necessary to provide special statutes, as previously mentioned, for such entities as community service districts, transit districts, and port districts. (See §§ 1463.10, 1463.11, 1463.13, 1463.13.) The functions of these public agencies would appear to be more analogous to that of the airport authority herein than the operations of the state, counties, and cities specified in subdivision (1) of section 1463. Community service districts, for example, may by formed '[t]o provide and maintain public airports and landing places for aerial traffic,' as well as 'maintenance of a police department or other public protection to protect and safeguard life and property.' (Gov. Code, § 61600.) If the Legislature believed such entities required their own statutes rather than be characterized as the state, a county, or a city under subdivision (1) of section 1463, a joint powers agreement airport should likewise not be characterized as one of the three latter types of public entities.

***5** In interpreting statutory enactments, we "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (People v. Davis (1981) 29 Cal.3d 814, 828.) "An equally basic rule of statutory constructing is, however, that courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them." (California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698.)

A joint powers airport authority is simply not a city, a county, or the state as those terms are normally used. We do not believe that the Legislature intended to cover joint powers agencies under the provisions of subdivision (1) of section 1463 . Subdivision (3) of section 1463, on the other hand, would be available for the disposition of fines under the conditions expressed therein.

In answer to the first question, therefore, we conclude that the provisions of section 1463 do not govern the distribution of fines resulting from the issuance of parking citations and the making of arrests by airport security officers at the Burbank-Glendale-Pasadena Airport except where the airport authority itself processes the parking violation fines or contracts for such services.

2. 'Deputized' Airport Security Officers

The second question presented is the same as the first, except an additional premise is provided: the Chief of the Burbank Police Department 'deputizes' the airport security officers. Would such action render applicable the provisions of subdivision (1) of section 1463 in that the security officers would be 'employees of a city'? We conclude that it would not.

Preliminarily, we note that the proper term to be used in the inquiry is 'appoint' rather than 'deputize.' Section 830.6, subdivision (a) states:

'(1) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman . . . and is assigned specific police functions by such authority, such person is a peace

officer; provided, such person qualifies as set forth in Section 832.6, and provided further, that the authority of such person as a peace officer shall extend only for the duration of such specific assignment.

'(2) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman . . . and is so designated by local ordinance or, if the local agency is not authorized to act by ordinance, by resolution, either individually or by class, and is assigned to the prevention and detection of crime and the general enforcement of the laws of this state by such authority, such person is a peace officer; provided such person qualifies as set forth in paragraph (1) of subdivision (a) of section 832.6, and provided further, that the authority of such person shall include the full powers and duties of a peace officer as provided by Section 830.1.'

'Deputize' refers to sheriffs, while 'appoint' refers to policemen.

***6** We need not consider, however, whether section 830.6 would be applicable to the facts presented herein. (See 56 Ops.Cal.Atty.Gen. 390, 393 (1973).) 'Deputizing' the airport security officers would not change their employment relationship with the airport authority for purposes of section 1463, subdivision (1). Salaries of the officers would still be paid by the airport authority under the postulated facts. While the term 'employed' is not easily defined and may have different meanings in different contexts (see Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal.3d 771, 777; Edwards v. Hollywood Canteen (1946) 27 Cal.2d 802, 805-807; Golden West Broadcasters, Inc. v. Superior Court (1981) 114 Cal.App.3d 947, 958-959), a determination that the officers were the 'employees' of the City of Burbank by being 'deputized' would be inimical to the purposes of section 1493.

In 25 Ops.Cal.Atty.Gen. 122, 123 (1955), we stated:

'Subdivision (1)(c) of Penal Code section 1463 provides that a fine or forfeiture of bail shall be distributed between the county and the city employing the arresting officer, according to a schedule contained in that section . . . [W]e feel it is clear that it was the intention of the Legislature to provide that the city whose employee made the original arrest should participate in the distribution of a subsequently imposed fine in order to reimburse the city of its expenses in law enforcement.'

We said in 53 Ops.Cal.Atty.Gen. 29, 31 (1970):

'The distribution scheme of Penal Code section 1463 is dependent upon the identity of the 'arresting' officer. It appears that the intent of the Legislature was to reimburse the entity which made the arrest for the costs of its law enforcement.'

Consequently, as long as the airport authority is responsible for the compensation of the security officers, the latter may not be considered the employees of the City of Burbank even if 'deputized' by the Burbank Police Chief. It would be incongruous to benefit the City of Burbank where it did not provide the funds for maintaining the airport security officers. [FN8]

In answer to the second question, therefore, we conclude that even if the Chief of the Burbank Police Department were to 'deputize' the airport security officers, the distribution of fines resulting from arrests and the issuance of parking citations by the officers would not be governed by the provisions of section 1463 except where the airport authority itself processes the parking violation fines or

contracts for such services under subdivision (3) of the statute.

3. Peace Officer Status

The third question concerns whether the airport security officers have peace officer status while off duty and not involved in law enforcement activities relating to the airport. We conclude that they do not have such status in the specified circumstances.

In relevant part, section 830.4 states:

'The following persons are peace officers while engaged in the performance of their duties in or about the properties owned, operated, or administered by their employing agency, or when they are required by their employer to perform their duties anywhere within the political subdivision which employs them. Such officers shall also have the authority of peace officers anywhere in the state as to an offense committed, or which there is probable cause to believe has been committed, with respect to persons or property the protection of which is the duty of such officer or when making an arrest pursuant to Section 836 of the Penal Code as to any public offense with respect to which there is an immediate danger to person or property or the escape of the perpetrator of the offense. Such peace officers may carry firearms only if authorized by and under such terms and conditions as are specified by their employing agency:

***7** '. . . .

'(k) Any person regularly employed as an airport law enforcement officer by a city, county, or district operating the airport or by a joint powers agency, created pursuant to [§§ 6500-6583] of the Government Code, operating the airport.' (Emphasis added.)

Under section 830.4, the airport security officers 'are' peace officers (i.e., have the 'status' of peace officers) depending upon their performance of law enforcement duties relating to the airport. (See Fowler v. State Personnel Bd., (1982) 134 Cal.App.3d 964, 970.)

Giving meaning to the language as to when one is a peace officer under section 830.4, we believe that the airport security officers are not peace officers when they are off duty and not performing their airport related activities.

It should be noted, however, that a person who is not a peace officer may nevertheless have certain peace officer powers. We recently examined the distinction between the status and the authority of a peace officer in various contexts. (65 Ops.Cal.Atty.Gen. ---- (Sept. 3, 1982) No. 81-1216.) With regard to section 830.4, the situations in which persons are granted 'the authority of peace officers' involve the powers of making arrests.

We need not dwell here, however, on the various 'powers' of peace officers. 'Status' refers to one's position or rank in relation to others (Webster's New Internat. Dict. (3d ed. 1966) p. 2230), which we do not equate with the various attributes of the position itself.

Hence, we conclude in answer to the third question that the airport security officers do not have peace officer status while off duty and not involved in law

enforcement activities relating to the airport.

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[FN1]. The authorizing legislation for entering into **joint powers agreements** is Government Code sections 6500-6583, whereby 'public agencies by agreement may jointly exercise any power common to the contracting parties.' (Gov. Code, § 6502.)

[FN2]. All section references hereafter are to the Penal Code unless otherwise indicated.

[FN3]. 'Forfeitures' here mean the same thing as 'fines.' (Board of Trustees v. Municipal Court (1977) 95 Cal.App.3d 322, 326.) Also, it is to be noted that the percentages listed in subdivision (1) are the percentages that go to the counties for arrests made in the listed cities.

[FN4]. In the typical situation of a parking violation, the person is 'notified' rather than 'arrested' by placing the parking ticket on the vehicle. (See County of Los Angeles v. City of Alhambra, supra, 27 Cal.3d 184, 193-194; 63 Ops.Cal.Atty.Gen. 29, 31, (1970).) Although subdivision (1) of section 1463 distributes the percentages of the fines collected depending in part on who has 'arrested' the person for a 'misdemeanor,' the same distribution formula is followed when a notification has been made of a parking violation 'infraction.' (See Veh. Code, § 42201.5; County of Los Angeles v. City of Alhambra, supra, 27 Cal.3d 184, 194.)

[FN5]. We look to subdivision (3) first because it would control over the provisions of subdivision (1) when both might otherwise be applicable. The latter subdivision begins with the phrase 'Except as otherwise specifically provided by law,' while the former begins, 'Notwithstanding any other provision of law.' (See In re Marriage of Dover (1971) 15 Cal.App.3d 675, 678, fn. 3; State of California v. Superior Court (1965) 238 Cal.App.2d 691, 695-696.)

[FN6]. Under subdivision (1) of the statute, the counties receive 100 percent of the fines, except where the arrests take place within a city. In the latter case, each city receives between 25 and 95 percent, depending on the circumstances and the particular percentage specified by the Legislature in the statute. Normally, a city will get most of the money resulting from arrests within its boundaries.

[FN7]. If the character of the contracting parties were controlling, a joint powers agreement between a city and county would present obvious difficulties, as would an agreement between two counties and a city, and so forth.

[FN8]. On the other hand, if the City of Burbank agrees to provide its employees for airport law enforcement duties under the joint powers agreement, a different

conclusion would be reached. Other arrangements could also be made under the joint powers agreement that would possibly render applicable the provisions of subdivision (1) of the statute.

65 Ops. Cal. Atty. Gen. 618, 1982 WL 156003 (Cal.A.G.)

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BELL COMMUNITY REDEVELOPMENT AGENCY, Plaintiff and Appellant,
v.
BYRON L. WOOSLEY, as Secretary, etc., Defendant and Respondent.
BELL COMMUNITY REDEVELOPMENT AGENCY, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; BYRON L. WOOSLEY, as Secretary, etc., Real Party in Interest.

Civ. Nos. B003190., Civ. Nos. B003007.

Court of Appeal, Second District, Division 5, California.

Jun 7, 1985.

SUMMARY

The trial court denied the petition of a community redevelopment agency for writ of mandate to compel the agency secretary to publish a notice inviting bids on the agency's tax allocation bonds. The bonds were to be repaid solely from tax increment funds. The secretary reasoned, and the trial court agreed, that the debt service on the proposed bond issue constituted an appropriation in excess of that allowed by Cal. Const., art. XIII B, which limits state and local government appropriations. The court found that Health & Saf. Code, § 33678, which exempts tax increment financing from the appropriation limitations of Cal. Const., art. XIII B, was unconstitutional on its face, and that tax increments authorized by Cal. Const., art. XVI, § 16, which sets forth the redevelopment process are not exempt from the constitutional limitation. (Superior Court of Los Angeles County, No. 470402, Bruce R. Geernaert, Judge.)

The Court of Appeal reversed and ordered the issuance of the writ. It held that the tax increment financing was not an "appropriation subject to limitation" as defined in Cal. Const., art. XIII B, § 8 , subd. (b). Rather, it held that tax allocation bonds constitute "bonded indebtedness" exempt under Cal. Const., art. XIII B, § 7, from the strictures of that constitutional article. Further, it held that Health & Saf. Code, § 33678, is a valid legislative interpretation and reconciliation of the constitutional limitation on appropriations and the constitutional provision setting forth the redevelopment process, which provides that tax increment revenues may be irrevocably pledged to the payment of tax allocation bonds. (Opinion by Hastings, J., with Feinerman, P. J., and Ashby, J., concurring.) ***25**

HEADNOTES

Classified to California Digest of Official Reports

(1) Public Housing and Redevelopment § 5--Urban Renewal Projects-- Financing.
Although a redevelopment agency has broad powers to implement a redevelopment plan formulated and adopted by a local government body, it does not have the power or the ability to levy a tax to finance these efforts.

(2a, 2b) Municipalities § 36--Fiscal Affairs--Appropriations and Expenditures--Validity of Tax Increment Bond Financing.
In an action by a community redevelopment agency for writ of mandate to compel the agency secretary to publish a notice inviting bids on the agency's tax allocation bonds, the trial court erred in denying the petition for the writ on the basis that the debt service on the proposed bond issue constituted an appropriation in excess of that allowed by Cal. Const., art. XIII B, which limits the growth of appropriations at both the state and local government level. The appropriation was not an "appropriation subject to limitation" as defined in Cal. Const., art., XIII B, § 8, subd. (b). Rather, tax allocation bonds constitute "bonded indebtedness" exempt under Cal. Const., art. XIII B, § 7, from the strictures of that constitutional article. Further, Cal. Const., art. XVI, § 16, sets forth with particularity

the entire redevelopment process, and provides that tax increment revenues may be irrevocably pledged to the payment of tax allocation bonds.

(3) Municipalities § 36--Fiscal Affairs--Appropriations and Expenditures--Constitutional Limitation on Appropriations.
Within the meaning of the phrase, "taxes levied by or for an entity," in Cal. Const., art. XIII B, § 8, subd. (b), the salient characteristics of one entity levying taxes "for" another entity are: the entity for whom the taxes are levied has the taxing power; the levying officers of the county exercise the taxing power of the entity for whom they are levying; they exercise such power as ex-officio officers of that entity; and the taxes collected are those of the "levied for" entity. None of these characteristics has any applicability to the redevelopment process as set forth in Cal. Const., art. XVI, § 16. Thus, a county does not levy taxes "for" a redevelopment agency within the meaning of Cal. Const., art. XIII B, § 8, subd. (b), which defines "appropriations subject to limitations" of a local government entity as "any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity."

(4a, 4b, 4c) Municipalities § 36--Fiscal Affairs--Appropriations and Expenditures--Tax Increment Financing of Redevelopment Bonds.
Health & Saf. Code, § 33678, which exempts tax increment financing ***26** from the appropriation limitations of Cal. Const., art. XIII B, is a valid legislative interpretation and reconciliation of that constitutional article and Cal. Const., art. XVI, § 16 , which sets forth the entire redevelopment process and provides that tax increment revenues may be irrevocably pledged to the payment of tax allocation bonds. Cal. Const., art. XIII B, fails to mention its effect on the redevelopment process, and in enacting Health & Saf. Code, § 33678, the Legislature intended to interpret the interrelationship between these two constitutional provisions and to dispel any ambiguity.

(5a, 5b) Constitutional Law § 10--Construction of Constitutions-- Presumption in Favor of Legislative Interpretation.
There is a strong presumption in favor of the Legislature's interpretation of a provision of the Constitution. Thus, where a constitutional provision may well have either of two meanings, if the Legislature has by statute adopted one meaning, its action in this respect is nearly, if not completely, controlling.

[See **Cal.Jur.3d,** Constitutional Law, § 51; **Am.Jur.2d,** Constitutional Law, § 125.]

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No appearance for Respondent Court.

HASTINGS, J.

This is an appeal from a denial of a petition for writ of mandate. Appellant Bell Community Redevelopment Agency sought to compel respondent Woosley, the Agency Secretary, to publish a notice inviting bids on the Agency's bonds. We reverse the superior court denial and order the writ of mandate to issue. ***27**

A discussion of the issues raised by this appeal perforce begins with a brief discussion of redevelopment law. California's redevelopment law was first passed in the 1950's. [FN1] The stated purpose is to present communities with a vehicle by which to eliminate the physical, social and economic liabilities characteristic of blighted areas.

FN1 It was first adopted in 1951 and, after voter approval, was made a part of the California Constitution in 1952 as section 19 of article XIII, since renumbered as article XVI, section 16.

The redevelopment process [FN2] begins when a community forms a Redevelopment Agency (Agency) which, along with the planning commission, identifies a predominantly urbanized, blighted area and designates it a redevelopment or project area. A plan for the project area is formulated and ultimately adopted by the local government body. (1)Though an Agency is given broad powers to implement this plan, it does not have the power nor ability to levy a tax to finance these efforts. (*Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 106 [211 Cal.Rptr. 133, 695 P.2d 220]; 56 Ops.Cal.Atty.Gen. 464, 469 (1973).) Instead, the Agency obtains the funds needed to acquire property and make improvements by accepting financial assistance from any public or private source, borrowing money, and issuing bonds. Incurrence of debt is by far the most common method utilized by an Agency. This is done through the issuance of "tax allocation bonds." The primary source of repayment of this indebtedness is "tax increments" received by the agency from governmental taxing agencies. The mechanics of tax increment financing was described in *Redevelopment Agency of San Bernardino v. County of San Bernardino* (1978) 21 Cal.3d 255, 259 [145 Cal.Rptr. 886, 578 P.2d 133].) "[I]f, after a redevelopment project has been approved, the *assessed valuation of taxable property* in the project increases, the taxes levied on such property in the project area are divided between the taxing agency and the redevelopment agency. The taxing agency receives the same amount of money it would have realized under the assessed valuation existing at the time the project was approved, while the additional money resulting from the rise in assessed valuation is placed in a special fund for repayment of indebtedness incurred in financing the project." (Italics in original.) The increase in assessed valuation occurs because of the new construction and revitalization in the project area. Once the debt is paid, the additional tax revenues revert back to the taxing agency. The Legislature devised this financing scheme so that redevelopment would largely pay for itself.

FN2 The process is codified in Health and Safety Code section 33000 et seq.

Through the years the validity of tax increment financing has been reviewed by our courts and consistently upheld. (***28***In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 72 [37 Cal.Rptr. 74, 389 P.2d 538]; *Redevelopment Agency v. Cooper* (1968) 267 Cal.App.2d 70 [72 Cal.Rptr. 557]; *Redevelopment Agency v. Malaki* (1963) 216 Cal.App.2d 480, 481-484 [31 Cal.Rptr. 92].)

Against this backdrop, California voters in 1978 approved Jarvis I (Prop. 13) which became article XIII A of our Constitution and in 1979 approved the Gann Initiative (Prop. 4) which became article XIII B. It is the applicability of the latter initiative that is at issue in this case.

In total, article XIII B contains 11 sections. For purposes of this discussion the following six are pertinent:

Section 1 limits the "total annual appropriations subject to limitation" of certain government entities funded by proceeds of taxes to "the appropriations limit of such entity for the prior year, adjusted for changes in cost of living and population ...."

Section 2 provides that revenues received in excess of the appropriated amount "shall be returned by revision of tax rates or fee schedules within the next two subsequent fiscal years."

Section 4 provides that the appropriations limit of an entity of government may be changed by vote of the electors of such entity.

Section 7 provides that article XIII B shall not be construed to impair the ability of state or local government to meet obligations with respect to existing or future bonded indebtedness.

Section 8 contains an extensive list of definitions. It defines "appropriations subject to limitations" of local government entity as "(b) ... any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity." It also defines "proceeds of taxes" in subdivision (c) to include all taxes; and revenues from license and user fees in excess of the costs of regulation; investment of tax revenues; and subventions received by the local government from the state. Subdivision (d) defines local government as "any city, county, city and county, school district, special district, authority or

other political subdivision of or within the state."

Section 9 excludes from appropriations subject to limitations "appropriations for debt service, appropriations to comply with court mandates, and appropriations of special districts with tax rates in 1977-78 of less than 12.5 cents per $100 of assessed valuation." ***29**

"[T]he thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; ..." (*County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [31 Cal.Rptr. 92].) This purpose is accomplished by limiting the "'total annual appropriations subject to limitation'" so that "'a governmental entity may not spend more in one year on a program funded with the proceeds of taxes than it did in the prior year.'" (*Huntington Park, supra.*, 38 Cal.3d at p. 107.)

In 1980 the state Legislature passed Health and Safety Code section 33678 [FN3] (§ 33678) as an urgency measure to make clear that the allocation and payment to redevelopment agencies of tax increments is not to be deemed the receipt of "proceeds of taxes" by an agency as defined by article XIII B. Apparently the Legislature so acted in response to the uncertainty created by article XIII B's failure to mention its effect on article XVI, section 16 (the redevelopment law) either in the statutory language, in the official analysis by the Legislative Analyst or in the official arguments included in the voter pamphlet.

FN3 This section is part of Senate Bill No. 1972, Statutes 1980, chapter 1342.

Facts

On June 21, 1976, appellant Bell Community Redevelopment Agency (Agency) adopted a redevelopment plan for the Cheli Industrial Redevelopment Project (Project). [FN4] The Project involved a $3 million tax allocation bond issue to effectuate the purchase of the property and the proposed development.

FN4 The plan envisioned industrial and commercial development within the Cheli Air Base, a former federal facility.

On August 15, 1983, the Bell City Council and the Agency concluded all necessary steps to issue the allocation bonds. The bonds are to be repaid solely from tax increment funds. Thereafter, the Agency secretary (respondent) refused to publish the notice inviting bids. He reasoned that the Agency and the city council had acted beyond their powers because the debt service on the proposed bond issue constituted an appropriation in excess of that allowed by article XIII B. Respondent claimed that this proposed notice committed him to appropriate and expend "proceeds of taxes" without regard to the appropriation limitations imposed by article XIII B.

On October 4, 1983, the Agency petitioned the Los Angeles Superior Court for a writ of mandate to compel respondent to publish the notice. The Agency argued (1) that section 33678 was a legislative interpretation of ***30** article XIII B and a valid reconciliation of article XIII B and article XVI, section 16. To hold otherwise, the Agency argued, would be to interpret article XIII B as a repeal by implication of article XVI, section 16-a finding which is contrary to the presumption against repeal by implication and the presumption of constitutionality accorded a legislative interpretation of our constitution; and (2) that the findings of the Legislature in adopting chapter 1342 (of which § 37678 is a part) are reasonable in their statement of facts constituting the necessity for such action and, consequently, are to be given great weight; and that chapter 1342 reasonably reconciles the language of article XVI, section 16, and article XIII B. Respondent countered by asserting that article XIII B did prohibit the issuance of the bonds because it was applicable to the Agency since it is a governmental entity as defined by section 8, subdivision (d); that article XIII B repealed by implication article XVI, section 16; and that the Legislature in section 33678 acted unconstitutionally because it went beyond interpretation to revision of article XIII B.

On November 22, 1983, the court denied the petition for the writ of mandate. In doing so the court found that (1) Health and Safety Code section 33678 (ch. 1342) is unconstitutional on its face; (2) article XIII B is a valid and subsisting provision of the Constitution; (3) Bell Community Redevelopment is subject to the provisions of

article XIII B; (4) tax increment proceeds are taxes levied for a redevelopment agency; (5) tax increments authorized by article XVI, section 16, are not exempt from article XIII B.

On appeal, the parties reassert the arguments summarized above. In addition, two amicus briefs have been filed. One is on behalf of the Community Redevelopment Agencies Association and twenty-three California cities.

Discussion

(2a)The threshold issue is whether tax increment financing is subject to the strictures of article XIII B. The superior court concluded that it was. It did so by making the determination that the Legislature acted unconstitutionally when it enacted section 33678, exempting tax increments from XIII B. The court then analyzed the language of section 8 and found that a redevelopment agency is an "entity of local government" and that the tax increment funds are collected by the county *for* the agency; therefore, they ***31** are "appropriations subject to limitation" as defined in section 8, subdivision (b). [FN5]

> FN5 This is a case of first impression. In *Huntington Park*, *supra.*, 38 Cal.3d 100, the Supreme Court chose specifically not to resolve this issue. In footnote 3, at page 108, it states: "Health and Safety Code section 33678, subdivision (a), declares the proceeds received from tax-increment financing to be outside article XIII B. We need not decide the validity of this section, as tax-increment financing is not at issue here, and we find there is a 'transfer of financial responsibility' within the meaning of section 33678 and article XIII B, section 3, subdivision (a), discussed below. For the same reasons, we find it unnecessary to consider whether article XIII B applies to redevelopment agencies."

To the extent that the court's analysis was confined to section 8, it is plausible. However, there is additional language in article XIII B, section 7, which we find controlling. Appellant and amici curiae advance the argument that the language of section 7 shows there was no intent in article XIII B to inhibit the use of tax allocation bonds. We agree. Section 7 provides: "Nothing in this Article shall be construed to impair the ability of the state or of any local government to meet its obligations with respect to *existing or future* bonded indebtedness." (Italics added.) As discussed above, tax-increment financing is the method through which repayment of tax allocation bonds is effectuated. Health and Safety Code section 33334.1 defines tax allocation bonds as a "bonded indebtedness."

To construe section 8, subdivision (b), as the court did, as including tax-increment payments, would be directly contrary to the mandate of section 7 because such construction would impair the ability of redevelopment agencies to meet their obligations with respect to their further tax allocation bond issues.

Article XVI, section 16, provides that tax-increment revenues "may be irrevocably pledged" to the payment of tax allocation bonds. If bonds must annually compete for payment within an annual appropriations limit, and their payment depend upon complying with the such limit, it is clear that tax allocation proceeds cannot be irrevocably pledged to the payment of the bonds. Annual bond payments would be contingent upon factors extraneous to the pledge. That is, bond payments would be revocable every year of their life to the extent that they conflicted with an annual appropriation limit. The untoward effect would be that bonds would become unsaleable because a purchaser could not depend upon the agency having a sure source of payment for such bonds. (Cf. *Redevelopment Agency v. County of San Bernardino* , *supra.*, 21 Cal.3d at p. 264.) Clearly, this results in an impairment of the ability of the redevelopment agency "to meet its obligations with respect to existing or future bonded indebtedness" and is contrary to the mandates of article XIII B, section 7. ***32**

Upon a reading of the complete text of article XIII B we find further support for this holding. Article XIII B governs "appropriations subject to limitation"; a redevelopment agency has no appropriation limit. (*Huntington Park*, *supra.*, 38 Cal.3d at p. 108.) Section 2 provides that revenues in excess of the appropriations limit be returned to the taxpayers; article XVI, section 16 and case law

require that tax increments be returned to the taxing entity upon elimination of the debt. Section 4 calls for a vote of the "electors" of an entity to change an appropriations limit; dependence on such periodic approval for repayment would effectively negate the viability of a bond issuance. Section 9, subdivision (a) expressly excludes debt service from "appropriations subject to limitations"; tax increments are exactly that.

(3)At the hearing, the court and counsel engaged in a lively discussion regarding the meaning of "taxes levied by or for [an] entity." (Art. XIII B, § 8, subd. (b).) The court determined that the county is levying and collecting taxes "for" the redevelopment agency. Appellant asserts and we concur that the court's conclusion is erroneous.

The phrase "to levy taxes by or for an entity" has a special meaning of long-standing. The concept of one entity levying taxes for another dates back to at least 1895 (Stats. 1895, p. 219) and the adoption of an act providing for the levy of taxes "by or for" municipal corporations. This act allowed general law and charter cities to continue to exercise their taxing power directly or, if they so desired, to have the county levy and collect their taxes for them. (*Griggs v. Hartzoke* (1910) 13 Cal.App. 429, 430-432 [109 P. 1104]; *County of Los Angeles v. Superior Court* (1941) 17 Cal.2d 707, 710-711 [112 P.2d 10].) The legal effect of this arrangement, as explained by case law, was that the taxing power exercised was that of the city, and it remained in the city. The county officers in levying taxes for the city became ex-officio officers of the city and exercised the city's taxing power. (*Madary v. City of Fresno* (1912) 20 Cal.App. 91, 93-94 [128 P. 340].) In levying taxes for the city the county was levying "municipal taxes" through the ordinary county machinery. (*Griggs*, *supra.*, at p. 432.)

Thus, the salient characteristics of one entity levying taxes "for" another entity are: (1) the entity for whom the taxes are levied has the taxing power; (2) the levying officers of the county exercise the taxing power of the entity for whom they are levying; (3) they exercise such power as ex-officio officers of that entity, and (4) the taxes collected are those of the "levied for" entity. It is obvious that none of these characteristics has any applicability to the redevelopment process as set forth in article XVI, section 16. The first and foremost fact which mandates this conclusion is that a redevelopment ***33** agency does not have the power to tax. (*Huntington*, *supra.*, 38 Cal.3d 100.) That being the case, we resolve that the county is not levying taxes "for" the Agency.

In addition, we are supported by the generalized view of construction that "when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (Code Civ. Proc., § 1859.) (2b)Article XVI, section 16, with careful particularity, sets forth the entire redevelopment process. The constitutional process relating to tax increment financing of redevelopment agencies is a special provision, applying only to redevelopment agencies. Article XIII B (Gann Initiative) is a general enactment which, if it covers redevelopment agencies at all, does so by "unwritten words and in an 'oblique, confusing and ambiguous fashion.' [Citation.]" (*Disabled & Blind Action Comm. of Cal. v. Jenkins* (1974) 44 Cal.App.3d 74, 83 [118 Cal.Rptr. 536].)

(4a)Finally, we discuss the validity of section 33678 , the legislative enactment which exempted tax increment financing from the requirements of article XIII B. [FN6] The lower court found this action to be an unconstitutional attempt by the Legislature to rewrite, rather than interpret, article XIII B. Much of the court's reasoning hinged on its interpretation of the "by or for" phrase discussed above, which we have found to be erroneous. (*Supra.*) (5a)In addition, however, there is "the strong presumption in favor of the legislature's interpretation of a provision of the Constitution." (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 692 [97 Cal.Rptr. 1, 488 P.2d 161].) (4b)This presumption prompts our finding ***34** that section 33678 is a valid legislative interpretation and reconciliation of article XIII B and article XVI, section 16.

> FN6 Section 33678 in pertinent part, provides: "(a) This section implements and fulfills the intent of this article and of Article XIII B and Section 16 of Article XVI of the California Constitution. The allocation and payment to an [redevelopment] agency of the portion of taxes specified in subdivision (b) of

> section 33670 [i.e. tax increments] for the purpose of paying principal of, or interest on, loans, advances, or indebtedness incurred for redevelopment activity, as defined in subdivision (b) of this section, shall not be deemed the receipt by an agency of proceeds of taxes levied by or on behalf of the agency within the meaning or for the purposes of Article XIII B of the California Constitution, nor shall such portion of taxes be deemed receipt of proceeds of taxes by, or an appropriation subject to limitation of, any other public body within the meaning or for purposes of Article XIII B of the California Constitution or any statutory provision enacted in implementation of Article XIII B. The allocation and payment to an agency of such portion of taxes shall not be deemed the appropriation by a redevelopment agency of proceeds of taxes levied by or on behalf of a redevelopment agency within the meaning or for purposes of Article XIII B of the California Constitution .... [¶] Should any law hereafter enacted, without a vote of the electorate, confer taxing power upon an agency, the exercise of such power by the agency in any fiscal year shall be deemed a transfer of financial responsibility from the community to the agency for such fiscal year within the meaning of subdivision (a) of Section 3 of Article XIII B of the California Constitution."

As noted previously, article XIII B fails to mention its effect on the redevelopment process. The statutory language, the official analysis by the legislative analyst, the official arguments included in the voter pamphlet are all silent on this matter. It is clear from the language of section 33678, quoted *ante* in footnote 6, that the Legislature intended to interpret the interrelationship between article XIII B and article XVI, section 16, and to dispel any ambiguity. (5b)"'[W]here a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well nigh, if not completely, controlling. When the Legislature has once construed the constitution, for the courts then to place a different construction upon it means they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and coordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution.'" (*Methodist Hospital v. Saylor* , *supra.*, 5 Cal.3d at p. 692, quoting *San Francisco v. Industrial Acc. Com.* (1920) 183 Cal. 273, 279 [191 P. 26].) For the reasons stated above, we conclude that section 33678 is not opposed to the Constitution.

The denial of the petition for writ of mandate is reversed. Let the writ issue.

Feinerman, P. J., and Ashby, J., concurred. ***35**

Cal.App.2.Dist.,1985.

Bell Community Redevelopment Agency v. Woosley

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THOMAS M. WHITE, Plaintiff and Respondent,
v.
ULTRAMAR, INC., Defendant and Appellant.

No. S070177.

Supreme Court of California

Aug. 23, 1999.

SUMMARY

An assistant manager brought an action for wrongful termination in retaliation against his former employer, a convenience store operator, arising when plaintiff testified on his own time at the unemployment compensation hearing of defendant's former employee and thereafter was fired. The trial court entered judgment on a jury verdict for plaintiff that awarded plaintiff compensatory and punitive damages. (Superior Court of San Diego County, No. 670423, Donald L. Meloche, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D023907, affirmed the judgment, concluding that plaintiff was entitled to punitive damages on the ground that the supervisory employee who was primarily responsible for plaintiff's retaliatory discharge was a managing agent of defendant under Civ. Code, § 3294, subd. (b) (corporation liable for punitive damages for managing agent's act of oppression, fraud, or malice).

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, although the Court of Appeal erroneously concluded that the mere ability to hire and fire employees renders a supervisory employee a managing agent under Civ. Code, § 3294, subd. (b), under the facts of this case, the supervisor who fired plaintiff was a managing agent under the statute whose conduct could lead to imposing punitive damages on defendant. In amending Civ. Code, § 3294, subd. (b), the Legislature intended that principal liability for punitive damages not depend on supervisory employees' managerial level, but on the extent to which they exercise substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation can be managing agents. Conversely, supervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees. In this case, the supervisor exercised substantial discretionary authority over vital aspects of defendant's business that included managing numerous stores on a daily basis and making significant decisions affecting ***564** both store policy and company policy. (Opinion by Chin, J., with George, C. J., Kennard, Baxter, Werdegar, and Brown, JJ., concurring. Concurring opinion by Mosk, J., with Werdegar, J., concurring (see p. 578).)

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 30--Construction--Language--Literal Interpretation--Plain Meaning Rule.
When construing a statute, the court ascertains the Legislature's intent in order to effectuate a law's purpose. The court must look to the statute's words and give them their usual and ordinary meaning. The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent.

(2) Statutes § 13--Amendment--Presumptions--Awareness of Prior Judicial Construction.
When the Legislature amends a statute, courts presume that the Legislature was fully aware of the prior judicial construction.

(3) Employer and Employee § 10--Actions for Wrongful Discharge--Damages-- Punitive Damages--Determination of Corporate Punitive Damage Liability-- Managing Agent:Damages § 25--Punitive Damages--Parties Liable.
In an action for wrongful termination in retaliation brought by an assistant manager against his former employer, a convenience store operator, the trial court properly entered judgment on a jury verdict that awarded punitive damages for plaintiff. Although the mere ability to hire and fire employees does not render a supervisory employee a managing agent under Civ. Code, § 3294, subd. (b) (corporation liable for punitive damages for managing agent's act

of oppression, fraud, or malice), under the facts of this case, the supervisor who fired plaintiff was a managing agent under the statute whose conduct could lead to imposing punitive damages on defendant. In amending Civ. Code, § 3294, subd. (b), the Legislature intended that principal liability for punitive damages not depend on supervisory employees' managerial level, but on the extent to which they exercise substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation can be managing agents. Conversely, supervisors who have no ***565** discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees. In this case, the supervisor exercised substantial discretionary authority over vital aspects of defendant's business that included managing numerous stores on a daily basis and making significant decisions affecting both store policy and company policy. (Disapproving to the extent they are inconsistent: *Stephens v. Coldwell Banker Commercial Group* (1988) 199 Cal.App.3d 1394 [246 Cal.Rptr. 606]; *Agarwal v. Johnson* (1979) 25 Cal.3d 932 [160 Cal.Rptr. 141, 603 P.2d 58].)

[See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1344 et seq.]

COUNSEL

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CHIN, J.

We granted review to resolve a conflict in the Courts of Appeal over how to define the statutory term "managing agent" for determining corporate punitive damage liability under Civil Code section 3294, subdivision (b). [FN1] Some courts, including the Court of Appeal in this case, broadly define the term to include supervisory employees who have limited decisionmaking authority, but possess the ability to hire and fire company employees. (See, e.g., *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1404 [245 Cal.Rptr. 606] (*Stephens*).) Others limit the term's application to those employees who exercise substantial discretion in their decisionmaking so that their decisions ultimately determine corporate policy. (See, e.g., *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 421-422 [27 Cal.Rptr.2d 457] (*Kelly-Zurian*).)

FN1 All statutory references are to the Civil Code unless otherwise noted.
Section 3294 allows a plaintiff to seek punitive damages (as exemplary damages) "for the breach of an obligation not arising from contract" when the plaintiff can show

> by "clear and convincing evidence" that a defendant "has been guilty of oppression, fraud, or malice." (§ 3294, subd. (a).)
> In 1980, the Legislature added subdivision (b) to section 3294, to add a special qualification for employer liability for those damages. Subdivision (b) states, in relevant part, that an employer shall not be liable for punitive damages based on an employee's acts unless "the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." The statute includes an additional qualification for corporate employers, who may not be liable for punitive damages unless "the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice [is] on the part of an officer, director, or managing agent of the corporation." (§ 3294, subd. (b).)

We disagree with the Court of Appeal's conclusion that the mere ability to hire and fire employees renders a supervisory employee a managing agent under section 3294, subdivision (b). Instead, we conclude the Legislature intended the term "managing agent" to include only those corporate employees who exercise substantial independent authority and judgment in their ***567** corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.

As noted, we disagree with the Court of Appeal to the extent its decision conflicts with our construction of managing agent under section 3294, subdivision (b). Nonetheless, we affirm its judgment in plaintiff's favor after concluding that Lorraine Salla, defendant's zone manager and the employee who fired plaintiff, was a managing agent under the statute.

A. *Facts*

Plaintiff Thomas M. White (plaintiff) worked in a convenience store owned by Ultramar, Inc. (Ultramar). He was promoted to assistant manager in November 1992. The store manager, Russ Gossman, who hired plaintiff, told him employees could ignore the company's written drink policy that they could have free fountain sodas and coffee, but only if they used their own cups. The policy required employees to pay for their drinks if they used company cups. The store manager who replaced Gossman, Larry Asemka, also told plaintiff that he did not follow the store's written drink policy. Asemka was later fired. He asked plaintiff to testify at his unemployment benefits hearing, and plaintiff agreed to do so.

The hearing was in the morning; plaintiff's shift at the store did not begin until the afternoon. On the morning of the hearing, plaintiff went to the store to pick up another employee, Ernest Fimbres, who had also agreed to testify at the hearing. Plaintiff, who was not on duty at the time, entered the store and drew a soda from the soda fountain; Fimbres also took a drink from the fountain. Neither plaintiff nor Fimbres paid for the sodas even though they used company cups in violation of the company's written drink policy.

Plaintiff testified at trial that the new store manager, Thomas McKinney, saw him take the soda, that he asked plaintiff to begin his shift earlier in the day, that plaintiff agreed to do so, and that he said nothing else as plaintiff and Fimbres left the store without paying for their drinks. McKinney testified that he told plaintiff and Fimbres they were supposed to pay for the drinks. He called Salla and asked her permission to fire them when they did not. According to McKinney, Salla told him she would consult with the company's human resources department before taking any action against the employees.

Plaintiff, Salla, and Fimbres testified at Asemka's unemployment hearing. When plaintiff went to work after the hearing, McKinney told him he was suspended and ordered him to wait outside the store until Salla arrived. ***568**

According to plaintiff, when Salla arrived, she told him he "kn[e]w better than to do something like that against [her]." Plaintiff told her she could not fire him for testifying at Asemka's hearing; she replied she was firing him for stealing soda. Fimbres was also fired. Salla testified at trial that she fired plaintiff for refusing to pay for a drink. The store was equipped with a videotaping system designed to operate 24 hours a day. On the day Salla fired plaintiff, however, there was a gap of several minutes in the tape; the missing tape covered the time period when plaintiff and Fimbres got drinks in the store and McKinney,

the manager, purportedly told them they had to pay.

Plaintiff sued Ultramar, claiming, inter alia, that he was wrongfully terminated in retaliation for testifying at the unemployment hearing, a violation of company policy [FN2] and public policy under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 [164 Cal.Rptr. 839, 610 P.2d 1330, 9 A.L.R.4th 314] (*Tameny*). The jury awarded him $42,000 in compensatory damages and $300,000 in punitive damages.

> FN2 Ultramar included a copy of its "Employment Policies and Standards" in an appendix to its Court of Appeal opening brief. This document specifically informs all employees that the corporation "will not tolerate discriminatory, unequal or improper treatment of others." The company's "policy against discrimination and harassment" also forbids employees from discriminating against other employees "in any form," and "in both employment, action and in every day personal interactions." We could find no direct reference to unemployment hearings in the manual itself. Moreover, Ultramar does not argue, and the record does not show, that Salla acted in violation of a specific written policy forbidding retaliation against employees under the circumstances here. We note, however, that Ultramar admitted that it was company policy to contest their terminated employees' rights to collect unemployment compensation.
> Although the issue is not presented here, and we do not address it or offer our view on its merits, in future cases, if a company has a written policy that specifically forbids retaliation against employees who testify at unemployment hearings, it may operate to limit corporate liability for punitive damages, as long as the employer implements the written policy in good faith. (See *Kolstad v. American Dental Assn.* (1999) ___ U.S. ___, ___ [119 S.Ct. 2118, 2127-2128, ___ L.Ed.2d ___] [existence of written policy forbidding discrimination under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) may operate as a bar to punitive damage liability].)

As to the punitive damages question, the jury was instructed under BAJI No. 14.74, which provides that "[a]n employee acts in a managerial capacity where the degree of discretion permitted the employee in making decisions is such that the employee's decisions will ultimately determine the business policy of the employer." The jury awarded plaintiff punitive damages after finding "by clear and convincing evidence that [Ultramar] was guilty of malice, oppression or fraud" for firing plaintiff. However, the jury was not asked to specify which Ultramar employee it found to be a managing agent. After trial, the judge granted plaintiff's motion for prevailing party attorney ***569** fees under Labor Code section 218.5 and awarded him approximately $70,000 in addition to the compensatory and punitive damages awards.

Ultramar appealed. The Court of Appeal reversed the attorney fee award, but otherwise affirmed the judgment in plaintiff's favor on his *Tameny* claim. The court also upheld the punitive damages award against Ultramar on the ground that Salla was a managing agent under section 3294, subdivision (b), because she was the supervisor who ultimately fired him. We granted Ultramar's petition for review, and limited our review to the punitive damages question and the construction of "managing agent" under section 3294, subdivision (b).

B. *Background*

Before its 1980 amendment, section 3294 provided: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Stats. 1905, ch. 463, § 1, p. 621.) The statute was originally enacted in 1872, with minor amendments in 1901 and 1905.

Courts interpreted section 3294 to mean that a California corporation was liable for punitive damages only if the corporation itself, acting through those who managed its general affairs, engaged in the requisite oppression, fraud, or malice. Although a corporation could be liable for compensatory damages for an employee's tort under the respondeat superior doctrine, the corporation was not responsible for punitive damages where it neither personally directed nor ratified the wrongful act.

As stated in an early case, "The entire basis of the doctrine of vindictive [punitive] damages is that the

person, himself, *who is sued* has been guilty of recklessness or wickedness which amounts to a criminality that should be punished for the good of society, and as a warning to the individual; but to award such damages against the master for the criminality of the servant is to punish a man for that of which he is not guilty." (*Warner v. Southern Pacific Co.* (1896) 113 Cal. 105, 112 [45 P. 187], original italics; see also *Lowe v. Yolo County etc. Water Co.* (1910) 157 Cal. 503, 511-512 [108 P. 297] [affirming punitive damages award against water company for withholding irrigation water, after noting the company's president and general manager, who acted on behalf of the board of directors, jointly made the wrongful and oppressive decision]; *Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 248-250 [137 Cal.Rptr. 244] [upholding punitive damage ***570** award after finding the wrong was authorized at the level of responsible corporate management]; *Gordon v. Industrial Acc. Com.* (1926) 199 Cal. 420, 426-427 [249 P. 849, 58 A.L.R. 1374] [noting that statutes governing corporations define the term "managing agent" as one who has discretionary powers of direction and control over corporate business]; *Towt v. Pope* (1959) 168 Cal.App.2d 520, 528-529 [336 P.2d 276] [in workers' compensation liability action, distinguishing "executive officials, presidents, vice-presidents, and managing agents" of corporation from superintendents, foremen, and "those immediately in control and management of the particular employee, his work and his place of employment"].)

In 1979, this court looked to the Restatement Second of Torts section 909 to determine when a corporate insurer might be liable for punitive damages based on its agent's wrongful denial of policy benefits. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822-823 [169 Cal.Rptr. 691, 620 P.2d 141] (*Egan*); see *Hale v. Farmers Ins. Exch.* (1974) 42 Cal.App.3d 681 [117 Cal.Rptr. 146], disapproved on other grounds in *Egan, supra,* 24 Cal.3d at p. 822, fn. 5.) The tentative draft of the Restatement provided that punitive damages were allowed if: "(a) the principal authorized the doing and the manner of the act, or [¶] (b) the agent was unfit and the principal was reckless in employing him, or [¶] (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or [¶] (d) the principal or a managerial agent of the principal ratified or approved the act." (Rest.2d Torts (Tent. Draft No. 19, Mar. 30, 1973) § 909, p. 85.) (The current version of the Restatement Second of Torts section 909 differs primarily in its substitution of "principal or a managerial agent" wherever "principal" appeared in the section's tentative draft.)

Comment b to section 909 of the Restatement Second of Torts stated the rationale behind imposing punitive damages liability on employers when their employees engaged in wrongful conduct: "The rule stated in this Section results from the reasons for awarding punitive damages, which make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously. It is, however, within the general spirit of the rule to make liable an employer who has recklessly employed or retained a servant or employee who was known to be vicious, if the harm resulted from that characteristic.... Nor is it unjust that a person on whose account another has acted should be responsible for an outrageous act for which he otherwise would not be if, with full knowledge of the act and the way in which it was done, he ratifies it, or, in cases in which he would be liable for the act but not subject to punitive damages, he expresses approval of it.... In these cases, punitive damages are granted primarily because of the principal's own wrongful conduct. [¶] ***571** Although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions." (Rest.2d Torts, § 909, com. b, p. 468.)

Egan involved a bad faith claim against an insurer for breach of the covenant of good faith and fair dealing based on the failure of two employees to investigate adequately a claim before denying insurance coverage. The court concluded that, under the Restatement, an insurer's liability for punitive damages should not turn on any official title, but on whether either of its two employees acted in a "managerial capacity," depending on the "degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." (*Egan, supra,* 24 Cal.3d at pp. 822-823.) *Egan* observed that a corporate defendant should not be able to shield itself " 'from liability by giving an employee a nonmanagerial title and relegating to him crucial policy decisions.' " (*Id.* at p. 823.) In concluding the insurer's employees worked in a managerial capacity, *Egan* emphasized that the employees exercised substantial discretionary authority over decisions that resulted in an "ad hoc formulation of policy," and their actions could be

imputed to the employer. (*Id.* at p. 823.)

Following *Egan, supra*, 24 Cal.3d 809, we revisited the punitive damages question in a case involving an engineer's claim that the managers of a large international corporation treated him maliciously. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 952 [160 Cal.Rptr. 141, 603 P.2d 58] (*Agarwal*).) Again, we applied *Egan*'s test to conclude that the managers who fired the plaintiff were vested with a degree of discretion over decisions that would ultimately determine corporate policy. This discretion, we concluded, was sufficient to support imposing punitive damages against the corporation under former section 3294. (*Agarwal, supra*, 25 Cal.3d at p. 952.)

C. *Section 3294, Subdivision (b), and Legislative Intent*

After *Egan, supra*, 24 Cal.3d 809, and *Agarwal, supra*, 25 Cal.3d 932, the Legislature drafted Senate Bill No. 1989 (1979-1980 Reg. Sess.) to codify and refine further the requirements for employer punitive damages liability. The new amendment added subdivision (b) to section 3294. (Stats. 1980, ch. 1242, § 1, p. 4217.) Following subsequent minor amendments, the statute now states in pertinent part: "An employer shall not be liable for [punitive] damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the ***572** rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. *With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.*" (§ 3294, subd. (b), italics added.) The drafters' goals were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages. (See *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1150-1151 [74 Cal.Rptr.2d 510]; see also *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712-713 [34 Cal.Rptr.2d 898, 882 P.2d 894] [noting that, after 1979, the Legislature limited circumstances under which an employer could be held liable for punitive damages].) Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an "officer, director, or managing agent."

(1) Under general settled canons of statutory construction, we ascertain the Legislature's intent in order to effectuate the law's purpose. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386 [241 Cal.Rptr. 67, 743 P.2d 1323].) We must look to the statute's words and give them their "usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal.Rptr.2d 238, 828 P.2d 140].) "The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861 [80 Cal.Rptr.2d 803, 968 P.2d 514].) Because section 3294, subdivision (b), does not specifically define the term "managing agent," we turn to expressions of legislative intent to construe it in the statute's relative context. [FN3]

> FN3 On May 26, 1999, we granted Ultramar's request that we take judicial notice of certain materials from the legislative history of section 3294, subdivision (b), including committee reports and individual legislators' (including co-authors') comments from the Assembly and Senate committee bill files.

In addition to these general principles, a specific rule of statutory interpretation is especially applicable to our task. (2) That is, when the Legislature amends a statute, we presume it was fully aware of the prior judicial construction. (See *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659 [147 Cal.Rptr. 359, 580 P.2d 1155] (*Palos Verdes*).) ***573**

(3) Using these interpretive rules to guide us, we believe that in amending section 3294, the Legislature intended (like *Egan, supra*, 24 Cal.3d at p. 823) to limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy. Our view finds support in a principle which "seeks to ascertain

common characteristics among things of the same kind, class, or nature when they are cataloged in legislative enactments." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159 [278 Cal.Rptr. 614, 805 P.2d 873] [describing the *ejusdem generis* principle].) The principle requires that when we interpret general statutory terms following the listing of specific classes of persons or things, we must construe the terms as applying to persons or things of the same general nature or class as those listed. The rule " ' "is based on the obvious reason that if the [writer] had intended the general words to be used in their unrestricted sense, [he or she] would not have mentioned the particular things or classes of things which would in that event become mere surplusage." ' " (*Id.* at p. 1160.) Using the doctrine to aid our interpretation of "managing agent," we note that section 3294, subdivision (b), placed that term next to the terms "officer" and "director," intending that a managing agent be more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, by selecting the term "managing agent," and placing it in the same category as "officer" and "director," the Legislature intended to limit the class of employees whose exercise of discretion could result in a corporate employer's liability for punitive damages.

Our interpretation of the Legislature's intent in adopting section 3294, subdivision (b), is shared by *Kelly-Zurian, supra,* 22 Cal.App.4th 397. *Kelly-Zurian* held that supervisory employees are not managing agents under section 3294, subdivision (b), unless they in fact exercise substantial discretion in their decisionmaking capability. (*Kelly-Zurian, supra*, 22 Cal.App.4th at p. 421.) In *Kelly-Zurian,* a sexual harassment action that resulted in a plaintiff's verdict for compensatory damages, the Court of Appeal held that the plaintiff was not entitled to punitive damages because evidence was lacking that her supervisor was a managing agent under section 3294, subdivision (b), even though he was a company administrator who had direct authority over her employment responsibilities. (*Kelly-Zurian, supra*, 22 Cal.App.4th at pp. 421-422.)

Kelly-Zurian based its decision on the plaintiff's failure to present evidence showing her supervisor was engaged in policymaking, whereas the defendant corporation presented substantial evidence to the contrary. (*Kelly-Zurian, supra*, 22 Cal.App.4th at p. 422.) For its reasoning, *Kelly-Zurian* ***574** relied on *Egan*'s observation that " '[t]he determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.' (*Egan*[,] *supra,* 24 Cal.3d at pp. 822-823.)" (*Kelly-Zurian, supra*, 22 Cal.App.4th at p. 421.) *Kelly-Zurian* specifically observed that the evidence showed the supervisor "had immediate and direct control over [the plaintiff] with the responsibility for supervising her performance. However, the fact [the plaintiff] reported to [her supervisor] and that he had the authority to terminate her merely reflect[ed] [he] was [her] *supervisor*, not that he was a managing agent." (*Id.* at pp. 421-422, original italics.) The court emphasized that the supervisor had no authority to establish or change the company's business policies. That authority rested in the parent company in another state. (*Id.* at p. 422.) The court also considered that the main office was in charge of business operations; it set business policies and guidelines and performed employee reviews. Moreover, the supervisor could not set the plaintiff's salary or approve a raise for her without the main office's authorization. (*Ibid.*) All of the factors considered in *Kelly-Zurian* were part of the managing agent equation, although not an exclusive list. They were important in determining whether the supervisor was a managing agent whose conduct could justify awarding punitive damages against his employer.

The Court of Appeal rejected *Kelly-Zurian*'s approach to the "managing agent" question, erroneously concluding that "*Egan* expressly rejected a narrow construction of the term 'managing agent' for purposes of determining liability for punitive damages." Instead, the Court of Appeal followed the more recent *Stephens* decision (*Stephens, supra,* 199 Cal.App.3d 1394). *Stephens* concluded that a district supervisor of a national property management firm was a managing agent within the meaning of section 3294, subdivision (b), because he "had immediate and direct control over the decision to demote plaintiff, and he was directly responsible for evaluating plaintiff's performance." (*Stephens, supra,* 199 Cal.App.3d at p. 1404.) [FN4] In rejecting *Kelly-Zurian*'s reasoning, and defining managing agent to include essentially all supervisory employees who possess the ability to hire and fire workers, the Court of Appeal concluded that Salla was a managing agent for section 3294 purposes because she "had supervisory control over [plaintiff's] employment and

had the most immediate control over the decision to ***575** fire him." In so doing, the Court of Appeal implicitly held that the language of section 3294, subdivision (b), is broad enough to render all corporate agents potentially responsible for punitive damage liability. Of note, however, is the fact that the court specifically did not address whether Salla exercised substantial discretionary authority over decisions that ultimately determine corporate policy.

> FN4 We disapprove *Stephens, supra*, 199 Cal.App.3d at page 1404, to the extent it conflicts with our construction of the "managing agent" term. We also note that the Court of Appeal relied on language in *Agarwal, supra*, 25 Cal.3d at page 952, that arguably implied mere supervisors could be managing agents as long as they have the ability to hire and fire employees. To the extent language in *Agarwal* could be so construed, we disapprove it.

The Court of Appeal's overly broad interpretation of the term "managing agent" effectively abrogates the statute's "officer, director, or managing agent" requirement. As amicus curiae Beverly Enterprises-California, Inc., appearing on Ultramar's behalf, explains, in the overwhelming majority of employment cases, the wrongdoer, by definition, had supervisory authority over the plaintiff. A rule defining managing agent as any supervisor who can hire or fire employees, but who does not have substantial authority over decisions that ultimately determine corporate policy, effectively allows punitive damage liability without proof of anything more than simple tort liability, which we have long recognized is insufficient. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 922 [148 Cal.Rptr. 389, 582 P.2d 980] (*Neal*); *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894 [157 Cal.Rptr. 693, 598 P.2d 854] [something more than mere commission of a tort is always required for punitive damage liability].) If we equate mere supervisory status with managing agent status, we will create a rule where corporate employers are liable for punitive damages in most employment cases. Such a rule would ignore *Egan*'s sound reasoning, defeat the Legislature's intent to discourage corporate acts of oppression, fraud, or malice under section 3294, subdivision (b), and end our emphasis on the limited role and deterrent purpose of punitive damages awards: "to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra*, 21 Cal.3d at p. 928, fn. 13; see also *Adams v. Murakami* (1991) 54 Cal.3d 105, 110 [284 Cal.Rptr. 318, 813 P.2d 1348] ["[T]he quintessence of punitive damages is to deter future misconduct by the defendant ...."].) It might also discourage employers from making good faith efforts to enforce policies that forbid discrimination or retaliation. (See *Kolstad v. American Dental Assn., supra*, ___ U.S. at p. ___ [119 S.Ct. at pp. 2126-2127] [employer may not be liable for managerial agents' discriminatory employment decisions that are contrary to employer's good faith efforts to comply with title VII of Civil Rights Act of 1964].)

Other Court of Appeal cases have also rejected a broad interpretation of the managing agent term. Like *Kelly-Zurian, supra*, 22 Cal.App.4th at page 421, these cases have interpreted section 3294, subdivision (b), and *Egan, supra*, 24 Cal.3d at pages 822-823, to permit imposition of punitive damages on an employer who has vested the offending employee with substantial ***576** discretionary authority over decisions that ultimately determine corporate policy. (See, e.g., *Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 193 [210 Cal.Rptr. 387] [substantial evidence that office manager "possessed that broad degree of discretion in decision making which determined [the employer's] corporate policy"]; *Siva v. General Tire & Rubber Co.* (1983) 146 Cal.App.3d 152, 159 [194 Cal.Rptr. 51] [no punitive damages when evidence did not support claim that management employees had discretion to exceed corporation's written standards for repairs].) In addition, the Ninth Circuit Court of Appeals supports the interpretation we adopt. (See, e.g., *Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 F.2d 658, 661 [holding that "[t]he key inquiry in the determination of whether an employee is a managing agent is 'the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy' "].)

The legislative history of section 3294, subdivision (b), is also consistent with our construction of "managing agent" and our view that the Legislature intended to limit application of section 3294 to employees who in fact exercise substantial authority over decisions that ultimately determine corporate policy. The bill amending section 3294 was revised several times before the Legislature settled on its final version. (Stats. 1980, ch. 1242, § 1, p. 4217.) As amended by the Senate, the bill provided that "... the advance knowledge, ratification, or act of oppression, fraud, or malice must be on the part of a senior executive officer or officers of the corporation in order for it to be liable for [punitive] damages."

(Sen. Amend. to Sen. Bill No. 1989 (1979-1980 Reg. Sess.) May 6, 1980.) The Legislature also inserted the term "conscious disregard" in place of the Restatement's "reckless," so that an employer could not be found liable merely for recklessly failing to research a potential employee's background. (See Conf. Amend. to Sen. Bill No. 1989 (1979- 1980 Reg. Sess.) Aug. 31, 1980 (Sen.), Aug. 27, 1980 (Assem.); Rest.2d Torts, § 909, p. 467.) The Assembly amended the bill, changing the phrase "senior executive officer or officers" to "agent ... employed in a managerial capacity," potentially allowing a plaintiff to impute punitive damages to the corporation if the corporate employee "was employed in a managerial capacity" or "[t]he principal or a managerial agent of the principal ratified or approved the act." (Assem. Amend. to Sen. Bill. No. 1989 (1979-1980 Reg. Sess.) July 2, 1980.) But the Legislature rejected the Assembly's attempt to return to the Restatement language. Before the Legislature enacted Senate Bill No. 1989 in late August 1980, a joint conference committee amended the bill to substitute "officer, director, or managing agent" for "agent ... employed in a managerial capacity." (Conf. Amend. to Sen. Bill No. 1989 (1979-1980 Reg. Sess.), *supra.*)

We therefore conclude that in amending section 3294, subdivision (b), the Legislature intended that principal liability for punitive damages not depend ***577** on employees' managerial level, but on the extent to which they exercise substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, supervisors who have broad discretionary powers and exercise substantial discretionary authority in the corporation could be managing agents. Conversely, supervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business.

D. *Was Salla a "Managing Agent"?*

Although the Court of Appeal did not review her job functions in detail, it concluded that Salla, the zone manager who fired plaintiff, was his supervisor, and was therefore a managing agent under section 3294, subdivision (b). Under our construction of the term, however, and contrary to the Court of Appeal, Salla's supervision of plaintiff and her ability to fire him alone were insufficient to make her a managing agent. Nonetheless, viewing all the facts in favor of the trial court judgment, we conclude that Salla was a managing agent as we construe the term.

As the zone manager for Ultramar, Salla was responsible for managing eight stores, including two stores in the San Diego area, and at least sixty-five employees. The individual store managers reported to her, and Salla reported to department heads in the corporation's retail management department.

The supervision of eight retail stores and sixty-five employees is a significant aspect of Ultramar's business. The testimony of Salla's superiors establishes that they delegated most, if not all, of the responsibility for running these stores to her. The fact that Salla spoke with other employees and consulted the human resources department before firing plaintiff does not detract from her admitted ability to act independently of those sources. In sum, Salla exercised substantial discretionary authority over vital aspects of Ultramar's business that included managing numerous stores on a daily basis and making significant decisions affecting both store and company policy. In firing White for testifying at an unemployment hearing, Salla exercised substantial discretionary authority over decisions that ultimately determined corporate policy in a most crucial aspect of Ultramar's business. ***578**

E. *Conclusion*

Salla was a managing agent under section 3294, subdivision (b), whose conduct could lead to imposing punitive damages on Ultramar. For this reason alone, we affirm the Court of Appeal judgment.

George, C. J., Kennard, J., Baxter, J., Werdegar, J., and Brown, J., concurred.

MOSK, J.

I concur in the result but write separately to clarify what I understand to be the correct test under Civil Code section 3294, subdivision (b), for determining corporate liability for the acts of a "managing agent."

1

Civil Code section 3294, subdivision (b), in relevant part provides that a corporate employer may be liable for punitive damages based on the wrongful acts of an employee if, with regard to the wrongful conduct, there was "advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice ... on the part of an officer, director, or managing agent of the corporation."

What is meant by the term "managing agent" under the statute?

As the majority state, we have previously addressed the scope of corporate liability for punitive damages based on the wrongdoing of their employees in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809 [169 Cal.Rptr. 691, 620 P.2d 141] (*Egan*) and *Agarwal v. Johnson* (1979) 25 Cal.3d 932 [160 Cal.Rptr. 141, 603 P.2d 58] (*Agarwal*). I agree that, in construing the term "managing agent" under Civil Code section 3294, we can and should be guided by those precedents.

Egan involved a claim against an insurer for breach of an insurance contract based on the failure of two of its employees, a claims manager and a claims analyst, adequately to investigate a claim before denying coverage. We determined that the insurance company might be liable for punitive damages based on the employees' wrongdoing, under the earlier version of Civil Code section 3294, which, like the present version, was enacted with the principal purpose of "discourag[ing] the perpetuation of objectionable corporate policies" (*Egan*, *supra*, 24 Cal.3d at p. 820).

In *Egan*, we observed that California follows the approach of the Restatement Second of Torts, which states that punitive damages can properly be ***579** awarded against a principal, inter alia, when " 'the agent was employed in a mangerial capacity and was acting in the scope of employment.' " (*Egan*, *supra*, 24 Cal.3d at p. 822, citing Rest.2d Torts (Tent. Draft No. 19, Mar. 30, 1973) § 909 (hereafter sometimes Restatement).) We explained that "the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." (*Egan*, *supra*, 24 Cal.3d at pp. 822-823.)

Responding to the argument that neither employee was involved in " 'high-level policy making,' " we emphasized that "[t]he determination whether employees act in a managerial capacity ... does not necessarily hinge on their 'level' in the corporate hierarchy." (*Egan*, *supra*, 24 Cal.3d at p. 822.) Rather, corporate liability should turn not on any official title, but on the extent of discretion conferred on the employee by the corporation. " 'Defendant should not be allowed to insulate itself from liability by giving an employee a nonmanagerial title and relegating to him crucial policy decisions.' " (*Id.* at p. 823.) We observed that the two employees possessed broad supervisory and decisionmaking authority regarding the disposition of claims: "The authority exercised by [the two employees] necessarily results in the ad hoc formulation of policy." (*Ibid.*)

In *Agarwal*, the plaintiff was awarded punitive damages against, inter alia, his employer after he suffered mistreatment, including racial harassment, at the hands of his two supervisors. On appeal, the defendants contended that the trial court's jury instruction on employer liability for the willful and malicious torts of its employees failed to distinguish between the employer's compensatory and punitive damage liability. We held that any error was harmless because the authority vested in the supervisors was sufficient to support imposing punitive damages against the corporation. Specifically, they had discretion to assign the plaintiff to menial projects, evaluate his performance, change his office location, deny him permission to attend educational seminars, and fire him on a pretextual reason. It was uncontroverted that they were " 'employed in a managerial capacity' " (one was the manager of project services for the corporation, responsible for 25 to 30 employees in 3 departments, the other his assistant), were directly responsible for supervising Agarwal's performance, and had "the most immediate control over the decision to terminate him." (*Agarwal*, *supra*, 25 Cal.3d at p. 952.)

The rule under both *Egan* and *Agarwal* is thus that a corporation may be liable for punitive damages based on the wrongful conduct of *an employee who exercises substantial discretionary authority over decisions that* ****580*** *ultimately determine corporate policy over an aspect of the corporation's business.* Liability turns not on the employee's managerial classification or title, but on the extent of his decisionmaking discretion. In some cases, such as *Agarwal* and the present matter, a supervisory employee with hiring and firing power will qualify as a "managing agent." That does not, however, mean that all supervisors, or all personnel with the power to hire and fire, are ipso facto "managing agents." Nor

are all policy makers necessarily "managing agents." Each case must be decided on its facts. [FN1]

> FN1 The Restatement's approach to corporate liability for punitive damages, which we followed in *Egan* and *Agarwal*, has also been adopted in several other jurisdictions. It is viewed as representing the more "conservative" approach as compared with the other rule of vicarious liability for all acts of employees under the doctrine of respondeat superior. (See, e.g., *Matter of P & E Boat Rentals, Inc.* (5th Cir. 1989) 872 F.2d 642, 650 [observing that a majority of the courts impose vicarious liability for punitive damages resulting from the acts of employees, but a number of courts follow the Restatement view]; *Smith's Food & Drug Cntrs. v. Bellegarde* (1998) 114 Nev. 602 [958 P.2d 1208, 1214] [adopting the "more conservative" Restatement approach, and finding that a temporary retail store manager who directed the actions of security guard was a "managing agent" whose actions could be imputed to the corporation]; *Dahl v. Sittner* (S.D. 1991) 474 N.W.2d 897, 902 [adopting the Restatement approach, noting that the states are almost evenly divided on whether to follow the vicarious liability rule or the more conservative Restatement view].)

In this matter, Lorraine Salla, the supervisor who made the initial decision to terminate plaintiff in retaliation for testifying at an unemployment compensation hearing, was a "zone manager" responsible for overseeing operations of several convenience stores in the San Diego area. As such, she was not a high-level manager or final policy maker for Ultramar, Inc. (Ultramar)-a large corporation that operates a chain of stores and gasoline service stations throughout California. In effect, she was an local supervisor; indeed, according to the testimony of her supervisors, she apparently lacked the authority to terminate plaintiff without the approval of Ultramar's human resources manager and division manager. Nor did she purport to set any firm-wide or official policy concerning termination of employees for testifying at unemployment hearings. Like the employees in *Egan* and *Agarwal*, however, she exercised authority that "necessarily result[ed] in the ad hoc formulation of policy" that adversely affected plaintiff. (*Egan*, *supra*, 24 Cal.3d at p. 823.) Specifically, she engaged in a local practice of retaliating against, by firing, an employee who testified at the unemployment hearing of another Ultramar employee. A corporate manager with such authority may fairly be deemed a managing agent under Civil Code section 3294, subdivision (b). That conclusion is compelled by the analysis in *Egan*, *supra*, 24 Cal.3d at pages 815-817, and *Agarwal*, *supra*, 25 Cal.3d at page 952. ***581**

II

As the majority explain, the Legislature, by referring to wrongful acts by an "officer, director, or managing agent" intended to codify *Egan* and *Agarwal*. The Senate bill to amend Civil Code section 3294 had limited corporate liability for punitive damages to wrongdoing of "senior executive officer or officers." The Assembly version substituted the Restatement's phrase, "principal or a managerial agent." The final conference committee version, however, substituted the words "officer" and "director" for the word "principal," and used the term "managing agent."

What was the significance of this final change? "Principal" is simply another term for "officer" and "director." There is no substantive difference between the terms "*managing* agent" and "*managerial* agent"; the word "managerial" means "of, relating to, or characteristic of, a manager," and a "manager" is "one that manages: a person that conducts, directs, or supervises something." (Webster's New Internat. Dict. (3d ed. 1961) p. 1372.) It would thus appear that the ultimate legislative intent was to retain the test under the Restatement Second of Torts section 909-which uses almost identical language in referring to a "principal or managerial agent"-as articulated in our decisions. This conclusion is supported by contemporaneous legislative materials indicating that the bill's sponsors, and even its opponents, including the California Trial Lawyers Association, believed that it codified rather than narrowed existing law. [FN2] ***582**

> FN2 Thus, a member of the conference committee, with the knowledge of the committee, requested that a letter be published in the Senate Journal regarding the significance of the adoption, in the final version of the bill, of the term "principal or managerial agent." The letter states that its purpose is "to clarify the intent of the Conference Committee and to set forth the representations that were made to [the

> member] during the Conference Committee by the proponents of the legislation. [¶] The intent of [the bill] as amended in conference ... with respect to the term ' managing agent' is not to alter the rule of corporate liability for punitive damages as it related to that term in the case of *Egan* ...." (Sen. David A. Roberti, letter to Sen. President Pro Tem. James R. Mills (Aug. 28, 1980) 8 Sen. J. (1979-1980 Reg. Sess.) p. 14548.) In letters to individual legislators urging them to vote for the bill, the measure's sponsors represented that the bill "would codify existing case law establishing the liability of employers for the acts of their employees ...." (See, e.g., Letter from Association for California Tort Reform, June 23, 1980.) The same understanding is reflected in the Governor's enrolled bill report: "Although the bill is opposed in concept by the California Trial Lawyers Association, *they concede that it does little more than codify existing caselaw.* This was also the clear understanding of the final conference committee." (Governor's Office, Dept. Legal Affairs, Enrolled Bill Rep., Sen. Bill 1989 (1979-1980 Reg. Sess.) p. 1, italics added.)
> The only contrary intent is indicated in identical letters authored by two individual legislators, one from the Assembly Speaker Pro Tempore addressed to the Speaker, and another from the bill's author to the Governor urging him to sign the bill. These letters represent that the bill repudiated the Restatement standard by eliminating the term "managerial capacity" and using "managing agent" instead. Because these letters apparently were not made available to the entire Legislature (see *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45, fn. 9 [77 Cal.Rptr.2d 709, 960 P.2d 513]), were contradicted by the letter in the Senate Journal representing the intent of the conference committee, and indicate a purpose different from that reflected in the Governor's enrolled bill report, they are entitled to no weight.

The Court of Appeal cases in point have uniformly reached a similar conclusion. In particular, *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 419-422 [27 Cal.Rptr.2d 457], states that *Agarwal* is consistent with Civil Code section 3294, and recites the Restatement section 909 rule that a corporation may be liable for punitive damages for acts of an agent employed in a "managerial capacity." The Court of Appeal in the present case similarly characterized *Kelly-Zurian*, observing that "*Egan* did not hold that an employee must actually be in a position to directly make policy to be deemed a managing agent," and that *Agarwal* held that supervisors with managerial authority may be managing agents under the statute.

Siva v. General Tire & Rubber Co. (1983) 146 Cal.App.3d 152, 158-159 [194 Cal.Rptr. 51], is also consistent with our decisions in *Egan* and *Agarwal*. There, an employee brought a products liability claim against his employer arising from a defectively repaired tire. *Siva* explains that a managing agent, as the term is used in section 3294, subdivision (b), "is an individual who has the discretion to act in '... a managerial capacity ... [by] making decisions that will ultimately determine corporate policy.' [Citing *Egan*.]" (146 Cal.App.3d at p. 159.) It determined that the workers who repaired the tire were not acting in a managerial capacity, because there was no evidence they "had the discretion to exceed [the employer's] written standards for repairs of this nature." It then concluded that the plant manager did clearly act in a managerial capacity, because he knew the extent of damage to the tire but failed to follow the company's written standards to correct it, thus creating an "implicit local policy" to disregard the standards. (*Ibid.*) It appears that the plant manager had no authority to create express corporate policy, but he made ad hoc policy by violating those standards.

Other Court of Appeal decisions have also applied the rule in *Egan* and *Agarwal*. (See, e.g., *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510] [citing *Egan* and noting that "we have no doubt that [Civil Code section 3294, subdivision (b),] does no more than codify and refine existing law"]; *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1403 [245 Cal.Rptr. 606] [citing *Agarwal*]; *Pusateri v. E. F. Hutton & Co.* (1986) 180 Cal.App.3d 247, 250 [225 Cal.Rptr. 526] [citing *Egan* and *Agarwal*]; ***583***Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 193 [210 Cal.Rptr. 387] [citing *Egan* and *Agarwal*].) For this reason, it would appear that the Legislature's repeated amendments of section 3294 since 1980 (in 1982, 1987, 1988, and 1992), without altering the "managing agent" language of subdivision (b), signifies approval of the judicial construction.

(*People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705] [" 'Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction.' "] (opn. of Chin, J.).)

Ultramar urges that the term "managing agent" should be construed to mean only someone with final policymaking authority akin to that of a very high-ranking corporate director or officer. Like the majority, I reject such a standard as too narrow and too vague; strictly applied, it would appear to absolve a corporate employer of liability in almost every case, particularly a large corporation with many levels of hierarchy.

I also reject any implication that Ultramar could avoid future liability simply by instituting a formal policy against retaliatory firing of its employees; I doubt that is what the Legislature intended in enacting Civil Code section 3294, subdivision (b). Ultramar cites the recent United States Supreme Court decision in *Kolstad v. American Dental Assn.* (1999) ___ U.S. ___ [119 S.Ct. 2118, ___ L.Ed.2d ___], urging that it should guide our decision herein. In *Kolstad*, which involved the liability of employers for punitive damages under the federal antidiscrimination statutes, the high court adapted general common law agency concepts in light of the specific objectives of title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). As the majority state, we have no occasion to consider to what extent those same objectives might be relevant in this, or any hypothetical, case under Civil Code section 3294. But in no event should a corporation be permitted to shield itself from liability by the expedient of a having a pro forma official policy-issued by high-level management-while conferring broad discretion in lower-level employees to implement company policy in a discriminatory or otherwise culpable manner. It is what the company *does*-including through the discretionary acts of its employees-not just what it *says* in a stated or written policy, that matters. [FN3]

> FN3 Indeed, the record indicates that it was a violation of Ultramar's "company policy" to retaliate against employees who testified at unemployment compensation hearings.

As in *Egan* and *Agarwal*, regardless of any stated or written official policy by Ultramar, Salla had sufficient discretion to take actions that necessarily ***584** resulted in the ad hoc formulation of policy over the aspect of the corporation's business giving rise to plaintiff's cause of action. For that reason, in my view she may fairly be treated as a managing agent for Ultramar. On this basis, I would affirm the judgment against Ultramar.

Werdegar, J., concurred. ***585**

Cal. 1999.

White v. Ultramar, Inc.

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48 Cal.3d 321
48 Cal.3d 321, 768 P.2d 1078, 256 Cal.Rptr. 401
(Cite as: 48 Cal.3d 321)

▷

THE PEOPLE, Plaintiff and Respondent,
v.
DARYL HARRISON, Defendant and Appellant

No. S003784.

Supreme Court of California

Mar 20, 1989.

SUMMARY

Defendant was convicted of three separate counts of violating Pen. Code, § 289 (penetration with foreign object), and the trial court imposed consecutive sentences for the offenses. The incident occurred when defendant broke into his victim's bedroom, and forcibly inserted his finger into her vagina three times. Each insertion lasted only a matter of seconds, since each time the victim was able to struggle free. The entire incident lasted only a few minutes. (Superior Court of San Diego County, No. 74921, William D. Mudd, Judge.)

The Supreme Court affirmed. It held that each sexual penetration which occurred during the continuous sexually assaultive encounter constituted a separate statutory violation. It held further that imposition of consecutive sentences for each offense did not violate the proscription of Pen. Code, § 654, against multiple punishments for the same offense, since defendant's activities did not constitute a single, indivisible course of conduct. (Opinion by Eagleson, J., with Lucas, C.J., Panelli and Kaufman, JJ., and Arguelles, J., [FN*] concurring. Broussard, J., concurred in the judgment. Separate opinion by Mosk, J., concurring in the judgment.)

FN* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e) Criminal Law § 526.2--Punishment-- Imprisonment--Sex Offenses--Consecutive Sentences--Multiple Digital Penetrations--Each as Separate Offense:Rape § 1--Offense Complete on Penetration.
The offense described by Pen. Code, § 289 (penetration with ***322** foreign object) is completed the moment penetration occurs, however slight, and each similar sexual penetration which occurs during a continuous sexually assaultive encounter may constitute a separate statutory violation. No minimum amount of time nor any period for reflection must separate such acts, nor must they be punctuated by any other significant nonsexual activity. (Disapproving, insofar as it holds to the contrary, *People v. Hammon* (1987) 191 Cal.App.3d 1084 [236 Cal.Rptr. 822].) Thus, defendant was properly convicted of three counts of penetration in violation of § 289, subd. (a), where he forcibly inserted his finger into a victim's vagina three times, each time being interrupted by his use of force and the victim's struggles. Even though each insertion lasted only a few seconds, and the entire episode lasted only a few minutes, under the plain meaning of § 289, three separate statutory violations occurred.

[What constitutes penetration in prosecution for rape or statutory rape, note, 76 **A.L.R.3d** 163. See also, **Cal.Jur.3d (Rev),** Criminal Law § 724; **Am.Jur.2d,** Rape, §§ 114, 115.]

(2a, 2b, 2c) Criminal Law § 550--Multiple Punishment--Single Act or Course of Conduct--Sex Offenses--Multiple Digital Penetrations.
Pen. Code, § 654 (multiple punishments for same crime prohibited), does not bar multiple punishments for numerous sexual offenses simply because the offenses are rapidly committed in succession against a victim with the single aim of achieving sexual gratification. Moreover, neither the type nor sequence of the offenses nor the reason for or duration of the interval between the crimes is relevant. Accordingly, on defendant's conviction of

sexual penetration (Pen. Code, § 289, subd. (a)) by successive insertions of his finger into his victim's vagina, the trial court properly imposed consecutive sentences for each insertion, even though each lasted only a few seconds, being interrupted each time by defendant's use of force and the victim's struggles, and the entire episode lasted only a few minutes.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Statute Patterned After Earlier Enactments Which Have Been Judicially Construed.
The Legislature is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. Where a statute is framed in the language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction.

(4) Rape § 15--Trial--Instructions--Elements--Multiple Counts Based on Same Misconduct--Additional Outrage by Victim.
In a prosecution ***323** for multiple digital sexual penetrations in violation of Pen. Code, § 289, subd. (a), the trial court did not err in failing to sua sponte instruct that to convict of multiple counts the jury must first find that defendant intended to inflict and the victim did endure additional outrage to her person and feelings for each successive penetration by defendant's finger. There is no statutory basis for requiring proof that defendant harbored the specific intent to inflict additional outrage, or that the victim demonstrably suffered such. Although Pen. Code, § 263, states that rape consists in the outrage suffered by the victim, that language expresses the public harm the statute is intended to forestall, it does not constitute an element of the crime.

(5) Criminal Law § 541--Multiple Punishment--Single Act or Course of Conduct--Multiple Crimes on Separate Dates--Applicability to Prosecution for Multiple Sexual Violations.
Neither the "election rule" for numerous crimes on numerous dates, under which either the prosecutor must elect which act is to support the charges or the jury must unanimously agree as to which act the defendant committed, nor the "continuous conduct" exception to that rule, applicable if the jury can agree that all crimes were committed on a certain date, was implicated in a prosecution for multiple violations of Pen. Code, § 289, subd. (a) (sexual penetration), which occurred on a single day in a continuous course of conduct.

(6) Criminal Law § 533--Multiple Punishment--Multiple Prosecution Distinguished.
Pen. Code, § 654, protects against multiple punishment, not multiple convictions. It literally applies only where such punishment arises out of multiple statutory violations produced by the same act or omission.

(7) Criminal Law § 541--Multiple Punishment--Single Act or Course of Conduct.
Because Pen. Code, § 654 (multiple punishment of same act prohibited) is intended to ensure that a defendant is punished commensurate with his culpability, its protection has been extended to cases in which there are several offenses committed during the course of conduct deemed to be indivisible in time.

(8) Criminal Law § 542--Multiple Punishment--Single Act or Course of Conduct--Intent and Objective Test.
It is the defendant's intent and objective, not the temporal proximity of his offenses, which determine whether a transaction is indivisible for purposes of applying the protections of Pen. Code, § 654 (multiple punishment of same act prohibited). If all the offenses were merely incidental to one objective, the defendant harbored only a single intent and may therefore be punished ***324** only once. However, if the defendant harbored multiple criminal objectives, which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.

COUNSEL

E. Stephen Temko, under appointment by the Supreme Court, and Howard C. Cohen for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Janelle B. Davis, Michael B. Wellington and Nancy L. Palmieri, Deputy Attorneys General, for Plaintiff and Respondent.

EAGLESON, J.

We granted review in this case to consider (1) whether a criminal defendant may be convicted of multiple statutory violations (Pen. Code, § 289, subd. (a)) [FN1] where he commits identical sex acts which are briefly interrupted by his use of force and the victim's struggles *and*, if so, (2) whether section 654 precludes separate punishment for each conviction.

FN1 All further statutory references are to the Penal Code.

(1a) The first issue focuses on the language of section 289, a relative newcomer in the legislative scheme governing sex crimes. At all pertinent times, this section has proscribed certain "penetration[s], however slight, of the genital or anal openings of another person" by "any foreign object, substance, instrument, or device." In light of preexisting legislative and judicial treatment of similar language elsewhere in the same scheme, we conclude that the offense described by section 289 may be deemed complete the moment "penetration" occurs. We also conclude, in keeping with a *near-unanimous* line of appellate authorities, that each similar sexual "penetration" which occurs during a continuous sexually assaultive encounter may constitute a separate statutory violation. Here, defendant's three convictions under section 289, subdivision (a), were properly affirmed on appeal.

(2a) The second question concerns the manner in which we have applied section 654 to multiple sex offenses arising out of a single course of ***325** criminal conduct. As we observed in *People* v. *Perez* (1979) 23 Cal.3d 545, 552-553 [153 Cal.Rptr. 40, 591 P.2d 63], section 654 does *not* bar multiple punishment simply because numerous sex offenses are rapidly committed against a victim with the "sole" aim of achieving sexual gratification. Further, there is no basis for distinguishing between defendants solely because of the type or sequence of sex acts committed, or because the victim made continuous sexual "penetration" difficult. In relying on a *uniform* line of post-*Perez* cases finding no section 654 bar to multiple punishment for rapidly repeated crimes, the Court of Appeal properly found no reason to disturb the consecutive sentences imposed herein.

We will therefore affirm the judgment of the Court of Appeal.

Facts

Approximately 5:15 a.m. on June 12, 1985, Virginia N., who lived alone and was legally blind, was awakened by a noise in her apartment. Hearing footsteps, she put on her eyeglasses, sat up in bed, and started to reach for the phone. As she did so, defendant rushed through the bedroom door towards the bed.

Virginia immediately started to scream and raised her arms to protect her face. Defendant grasped her shoulders and began hitting her in the face and upper arms. He then reached inside her underwear and inserted his finger into her vagina. While he was doing so, Virginia continued to struggle and ended up standing on the bed. She eventually pulled away and dislodged defendant's finger, which had been in her vagina for four seconds.

Virginia continued to scream and defendant continued to hit her. He then pushed her so that she was lying on the bed, and he was in a kneeling position beside her. He placed his hand over her mouth and again inserted his finger into her vagina. Meanwhile, Virginia pried defendant's hand away from her mouth, and he hit her in the face. She rolled to the other side of the bed, tried to kick defendant, and again dislodged his finger from her vagina. This second penetration lasted approximately five seconds.

Virginia then stood up and started to run for the door. Defendant grabbed her by the hair, pulled her towards him, and punched her in the throat. He then inserted his finger into her vagina a third time. She continued to struggle and the two ended up on the floor with defendant on top, still hitting her. While they were in this position, Virginia told defendant, "If you'll just stop this, we can do it." Virginia felt the pressure of his body lessen, and she scrambled

into the bathroom. She locked the door and was able to alert the neighbors with her screams. The third penetration lasted ***326** approximately five seconds, and "the entire attack," according to Virginia's testimony, lasted seven to ten minutes.

Defendant was charged with three counts of violating section 289, subdivision (a), [FN2] and burglary (§ 459). The information also alleged that defendant was "convicted of the felony of assault with a deadly weapon" (§ 245, subd. (a)(1)) in 1983, for which he "received probation." In his ensuing motion under section 995, defendant argued, inter alia, that two of the sex offenses should be dismissed because only one "indivisible" crime had occurred. The motion was denied.

> FN2 The information also alleged three alternative counts of rape (§ 261, subd. (2)), which were dismissed upon defendant's motion following presentation of the prosecution's case-in-chief.

The jury found defendant guilty of all three sex crimes and of burglary. Defendant also admitted the prior conviction.

At the sentencing hearing, defendant insisted, among other things, that section 654 precludes multiple punishment where only one "kind" of crime is committed during a brief sexual assault. However, the court cited sections 1170 and 1170.1, subdivision (a), and various factors in aggravation, and imposed a total seventeen-year sentence as follows: the upper term of eight years on one of the sex crimes; a consecutive sentence of one-third the middle term (i.e., two years) on each of the other two sex crimes; the upper term of six years on the burglary, with execution of that sentence stayed pursuant to section 654; [FN3] plus a consecutive, five-year "serious felony" enhancement for the prior conviction. (See § 667, subd. (a).)

> FN3 In support of its decision to impose the upper term on the principal sex offense and the burglary, the court found that the victim was particularly vulnerable, and that defendant's pattern of criminal activity indicates that he is a serious danger to society. (See rule 421(a)(3), (b)(1), Cal. Rules of Court.) In support of its decision to impose consecutive sentences on the two subordinate terms, the court found that defendant failed to "cease and desist" when each sexual penetration was interrupted, thereby committing separate acts of violence; that numerous convictions were involved; that the crime displayed a high degree of cruelty; and that defendant was on probation for assault with a deadly weapon when the crime was committed. (See rules 425(a)(2), (5), 421(a)(1), (b)(4), Cal. Rules of Court.)

On appeal, defendant reiterated that only one violation of section 289, subdivision (a), had occurred and, alternatively, that he could be punished for only one such conviction under section 654. The Court of Appeal disagreed, and affirmed the judgment with regard to the sex offense and burglary convictions. However, upon the urging of both defendant and the Attorney General, the court reversed and remanded for resentencing solely on the grounds that there was insufficient evidence to support the five-year enhancement. The enhancement portion of the Court of Appeal's judgment is not disputed here. ***327**

Discussion

A. *Number of Convictions*

(1b) Defendant renews his argument that multiple digital penetrations, committed during a brief "continuous" assault upon a struggling victim, constitute only a single violation of section 289. In effect, he suggests that, under such circumstances, the statutory offense extends from the initial penetration through final withdrawal, even though multiple penetrations have actually occurred in the interim. As we shall explain, this claim is belied by the plain meaning of section 289, and by the consistent interpretation of sister statutes which use materially similar language.

Preliminarily, we note that since its origin in 1872, the Penal Code has defined and prescribed punishment for the crimes of rape (§§ 261, 263, 264) [FN4] and sodomy (§§ 286, 287). [FN5] The predecessor to the current section governing oral copulation was enacted in 1915, and completes a basic trilogy of sex crimes. (§ 288a.) [FN6]

FN4 Section 261 defines rape as "an act of sexual intercourse" accomplished with a nonspouse under certain specified "circumstances," listed in subdivisions (1) through (7).
Section 263 provides: "The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. *Any sexual penetration, however slight, is sufficient to complete the crime*." (Italics added.)
Section 264, subdivision (a), provides, in pertinent part, that "[r]ape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years."

FN5 Section 286, subdivision (a), defines sodomy as "sexual conduct consisting of contact between the penis of one person and the anus of another person." Subdivisions (b) through (*l*) provide that participation in, or commission of, the act of sodomy under numerous specified circumstances is subject to the punishment described therein.
Section 287 provides: "*Any sexual penetration, however slight, is sufficient to complete the crime of sodomy*." (Italics added.)

FN6 Section 288a, subdivision (a), defines oral copulation as "the act of copulating the mouth of one person with the sexual organ or anus of another person." Subdivisions (b) through (*l*) provide that participation in, or commission of, the act of oral copulation under certain specified circumstances is subject to the punishment described therein.

However, before 1979, there was no felony proscription per se against nonconsensual contact with, or penetration of, another person's genitals or anus through the use of an instrument or body part other than the mouth or penis. Such conduct (assuming it did not invoke the various statutes relating to sexual conduct with minors) presumably would have been prosecuted as a battery. Absent serious bodily injury, it could have been punished as a misdemeanor. (See §§ 242, 243, subds. (a), (d); cf. § 243.4 [defining "sexual battery," added by Stats. 1982, ch. 1111, § 1, p. 4024].)

Apparently perceiving a deficiency in its treatment of sexually assaultive behavior, the Legislature enacted section 289. (Stats. 1978, ch. 1313, § 1, ***328** p. 4300; see also, *People v. Kusumoto* (1985) 169 Cal.App.3d 487, 491 [215 Cal.Rptr. 347]; *Review of Selected 1978 California Legislation, Crimes* (1979) 10 Pacific L.J. 392.) Since its original enactment, the statute has been greatly expanded in scope. [FN7] However, section 289 has always made clear that the crime is committed simply by causing a proscribed "penetration, *however slight*." (Italics added.) From this language, we can only conclude that, assuming all other elements of the offense are present, a violation is *complete* the moment such "penetration" occurs.

FN7 At the time of the instant crimes, section 289 made the proscribed "penetrations" criminal under only two basic circumstances - when committed under force or fear, or when the victim was incapable of consenting due to "lunacy or other unsoundness of mind." (Former § 289, subds. (a), (b).)
Defendant was convicted under former section 289, subdivision (a), which provided: "Every person who causes the *penetration, however slight*, of the genital or anal openings of another person, by any foreign object, substance, instrument, or device when the act is accomplished against the victim's will *by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury* on the victim or another person for the purpose of sexual arousal, gratification, or abuse, shall be punished by imprisonment in the state prison for three, six, or eight years." (Italics added.)
Section 289 *currently* makes it unlawful to commit sexual penetrations-by-object in a far greater number of circumstances. Briefly summarized, they involve: (a) use of force, fear, or threat of future retaliation; (b) inability to consent due to mental disorder or developmental or physical disability, (c) inability to consent due to mental disorder or developmental or

> physical disability, and both the victim and defendant are confined in a specified facility for the care of such persons; (d) unconscious victim; (e) inability to resist due to administration of intoxicating or other controlled substance; (f) submission induced by false belief that perpetrator is victim's spouse; or (g) threatening to use the authority of a public official to incarcerate, arrest, or deport. In addition, subdivisions (h) through (j) proscribe participation in the act where the victim and/or other participant is of a certain age.
>
> An amendment effective January 1, 1989, significantly broadens the circumstances under which a "penetration" may trigger the statute. (Stats. 1988, ch. 404, § 1, No. 3 Deering's Adv. Legis. Service, pp. 1544-1545; No. 6 West's Cal. Legis. Service, pp. 1053-1055.) Subdivision (a) now applies to "[e]very person who causes the penetration, however slight, of the genital or anal openings of any person or causes another person to so penetrate the defendant's or another person's genital or anal openings. ..." A similar change in language was made in each variation of the crime defined in the statute.

Using materially similar language, the Legislature has explicitly so provided in the statutes governing rape and sodomy. The section which describes the basic elements and circumstances attending the crime of rape (§ 261) is modified by companion language in section 263, which states, in part: "*Any sexual penetration, however slight, is sufficient to complete the crime.*" (Italics added.) Identical language in section 287 accompanies the sodomy statute (§ 286): "*Any sexual penetration, however slight, is sufficient to complete the crime* of sodomy." (Italics added.) Except for minor word changes not pertinent here, sections 263 and 287 have remained unchanged since their enactment. Both were in existence long before section 289 became law, and both relate to the same subject matter - unlawful penetrations of the genitals and anus. ***329**

Since the origin of the rape and sodomy statutes, the courts have strictly adhered to the statutory principle that a "penetration," however slight, "completes" the crime. (*People v. Chavez* (1894) 103 Cal. 407, 408 [37 P. 389]; *People v. Martinez* (1986) 188 Cal.App.3d 19, 22-25 [232 Cal.Rptr. 736]; *People* v. *Karsai* (1982) 131 Cal.App.3d 224, 232-233 [182 Cal.Rptr. 406] [disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165], fn. 8]; *People v. Esposti* (1947) 82 Cal.App.2d 76, 77-78 [185 P.2d 866]; *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121]; *People v. Marino* (1917) 33 Cal.App. 448, 451 [165 P. 564].) (3) The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. (*People v. Overstreet* (1986) 42 Cal.3d 891, 897 [231 Cal.Rptr. 213, 726 P.2d 1288].) Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction. (*Union Oil Associates* v. *Johnson* (1935) 2 Cal.2d 727, 734-735 [43 P.2d 291, 98 A.L.R. 1499].) (1c) Thus, in using identical words to define the analogous act in section 289, the Legislature undoubtedly intended to convey the same meaning. As with rape and sodomy, a violation of section 289 is "complete" the instant "slight" "penetration" of the proscribed nature occurs.

It follows logically that a *new and separate* violation of section 289 is "completed" each time a *new and separate* "penetration, however slight" occurs. Here, defendant does not dispute that his finger actually penetrated the victim's vagina against her will three *separate* times; that *each* penetration was accomplished with the statutorily prescribed intent; that the requisite degree of force or fear preceded, and was used to accomplish, *each* penetration; or that a finger is a foreign object within the meaning of the statute. (See generally, *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170]; CALJIC No. 10.60 (1985 rev.).) Accordingly, all the elements of three "completed" violations of section 289 were present.

Defendant acknowledges that section 289 has always defined the crime in terms of "penetration[s]." He suggests, however, that this language was only intended to distinguish between a completed offense and other offenses, such as an

attempt, assault with intent to commit the crime, or a battery.

We disagree. Obviously, *one* purpose of the "slight penetration" language used throughout this family of sex-offense statutes is to make clear that prolonged or deep insertion, or emission or orgasm, is unnecessary to "complete" the crime. (See, e.g., *People* v. *Thomas* (1986) 180 Cal.App.3d 47, 53-56 [225 Cal.Rptr. 277]; *People* v. *Karsai, supra*, 131 Cal.App.3d at pp. 232-233.) However, the plain meaning of the phrase does not limit it to that ***330** purpose, and we find no other indication it should be so confined. As section 263 notes with regard to the sufficiency of "penetration" in rape cases, the "essential guilt" of sex offenses lies in the "outrage to the person and feelings of the victim ...." The "slight penetration" language confirms that this peculiar "outrage" is deemed to occur each time the victim endures a new, unconsented sexual insertion. The Legislature, by devising a distinctly harsh sentencing scheme, has emphasized the seriousness with which society views each separate unconsented sexual act, even when all are committed on a single occasion. (See, e.g., § 667.6, subd. (c).) We find no merit in defendant's limited construction.

Indeed, defendant concedes that where the acts are of an entirely *different* nature, they may result in multiple convictions even if committed in rapid succession. Courts have long assumed that no minimum amount of time must separate such acts, nor must they be punctuated by any other significant nonsexual activity. (See, e.g., *People* v. *Slobodion* (1948) 31 Cal.2d 555, 557, 563 [191 P.2d 1] [lewd touching of vagina with penis, followed immediately by oral copulation]; *People v. Phillips* (1985) 169 Cal.App.3d 632, 635, 642 [215 Cal.Rptr. 394] [digital vaginal penetration followed after a brief interruption by rape]; *People v. Boyce* (1982) 128 Cal.App.3d 850, 854, 860 [180 Cal.Rptr. 573] [oral copulation followed immediately by rape]; *People v. Rance* (1980) 106 Cal.App.3d 245, 249-250, 255 [164 Cal.Rptr. 822] [rape, sodomy, and oral copulation, all apparently committed in uninterrupted succession]; *People v. Gay* (1964) 230 Cal.App.2d 102, 103-105 [40 Cal.Rptr. 778] [rape, sodomy, and oral copulation, all apparently committed in uninterrupted succession]; *People v. Mills* (1943) 58 Cal.App.2d 608, 609-610 [137 P.2d 698] [rape, sodomy, and oral copulation, all apparently committed in uninterrupted succession].)

Multiple convictions have also been upheld where several *identical* sex crimes are accompanied by commission of a *different* one. In some of these cases, the offenses have been separated by some break in time and/or movement of the victim to a new location. (See, e.g., *People v. Reeder* (1984) 152 Cal.App.3d 900, 915-917 [200 Cal.Rptr. 479] [*two* sets of oral copulation and rape over a "short period of time," where victim was allowed to have a cigarette in between each pair of crimes]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 726, 728 [182 Cal.Rptr. 671] [*two* rapes in car separated by an act of oral copulation, two car trips, and violence over three- to four-hour period]; *People v. Brown* (1973) 35 Cal.App.3d 317, 321 [110 Cal.Rptr. 854] [rape followed by defendant leaving the room for a short time to commit attempted rape on another victim, and returning to commit rape and sodomy on first victim].)

In other cases, it was never questioned that alternating offenses may follow one another in quick, uninterrupted succession. (See, e.g., ***331** *People* v. *Perez, supra*, 23 Cal.3d at pp. 548-549 [rape, sodomy, and *two* oral copulation convictions, committed during a continuous 45-to-60-minute attack]; *In re McGrew* (1967) 66 Cal.2d 685, 687-688 [58 Cal.Rptr. 561, 427 P.2d 161] [one oral copulation and *two* rape convictions, apparently committed in uninterrupted succession]; *People* v. *Price* (1986) 184 Cal.App.3d 1405, 1407- 1408 [229 Cal.Rptr. 550] [rape and sodomy, prefaced by *two* consecutive acts of oral copulation committed within a few moments and feet of each other].)

Although defendant deemphasizes the point, cases involving wholly *identical* sexual acts follow the same pattern. In some of these cases, no issue was raised that the defendant could not be separately convicted for each act. (*People v. Martinez* (1984) 150 Cal.App.3d 579, 586 [198 Cal.Rptr. 565] [two defendants convicted of four forcible rapes in concert; the first three rapes were committed consecutively by one defendant over the course of an hour, after which the other defendant committed the fourth rape]; *People* v. *Iverson* (1972) 26 Cal.App.3d 598, 600-601 [102 Cal.Rptr. 913], disapproved on other grounds in *In re Earley*

(1975) 14 Cal.3d 122, 130 [120 Cal.Rptr. 881, 534 P.2d 721], fn. 11 [victim testified to three acts of sexual intercourse committed consecutively in car; defendant was convicted of two of them].)

Other "same crime" cases specifically hold that separate convictions are appropriate, finding support in the statutory language deeming the offense complete upon "penetration." In *People v. Clem* (1980) 104 Cal.App.3d 337 [163 Cal.Rptr. 553], the court rejected defendant's claim that he could not be separately sentenced for five rape convictions involving one victim. The court cited sections 261 and 263; noted that the evidence indisputedly established five consecutive vaginal "penetrations" during an approximate two and one-half hour assault; and concluded that "[i]t can no longer be argued that where there are multiple sex acts performed upon a single victim, albeit within *a short space of time*, that *each act* does not comprise *a distinct and separate violation* and punishment." (*Id.*, at pp. 346-347, italics added.)

More to the point is *People v. Marks* (1986) 184 Cal.App.3d 458 [229 Cal.Rptr. 107]. There, defendant urged reversal of one of two sodomy convictions, claiming that his two anal contacts with the victim were "so close in time" as to constitute a "single offense." (*Id.*, at p. 464.) However, the court affirmed both counts, finding ample evidence of two separate anal "penetrations" - defendant inserted his penis in the victim's anus, withdrew, forced her across the room, repositioned her, and anally repenetrated her. (*Id.*, at pp. 464-467, & fn. 8.) A third case, *People v. Vela* (1985) 172 Cal.App.3d 237, 243 [218 Cal.Rptr. 161], contains compatible dictum: "If a ***332** female initially consents to an act of sexual intercourse but thereafter withdraws her consent, *each subsequent act of sexual penetration* accomplished by force or fear *will constitutes a separate and distinct act of rape*." (Italics added.)

Cases such as *Clem, supra*, 104 Cal.App.3d at page 337, *Marks, supra*, 184 Cal.App.3d at page 458, and *Vela, supra*, 172 Cal.App.3d at page 237, expose an inescapable truth. Multiple violations of section 289 are no less separate or offensive when they occur in sequence than when they are punctuated by violations of other statutes.

Here, however, defendant relies upon *People v. Hammon* (1987) 191 Cal.App.3d 1084, 1097 [236 Cal.Rptr. 822], which denounced the *Clem-Marks-Vela* "analysis." Hammon's 11 lewd conduct convictions (§ 288, subd. (a)) were based on photographs, some of which apparently were taken moments apart, depicting defendant and a female infant engaged in oral copulation, sexual intercourse, and other lewd acts. Although defendant raised a section 654 *sentencing* claim, the Court of Appeal reversed four of his convictions on the basis of a new test for determining when a sex offense is completed: "[I]dentical sexual acts constitute separate and discrete crimes when they are separated (1) by the commission of a different sexual offense, (2) by sexual climax, (3) by an appreciable passage of time, or (4) by a reasonable opportunity for reflection." (*Id.*, at p. 1099.)

An initial observation is that *Hammon* failed to analyze the sufficiency of the evidence in terms of the particular statutory violations at issue. Although only a few of the charges in that case required proof of "penetration," the court was troubled by certain *sentencing* disparities it believed this concept generated under section 654. (See 191 Cal.App.3d at pp. 1097-1098.)

Saving all sentencing questions for later (see Discussion, part B, *post*), we conclude that *Hammon* erred by inserting irrelevant factors into the definition of a sex offense. (See *People v. Dillon* (1983) 34 Cal.3d 441, 463 [194 Cal.Rptr. 390, 668 P.2d 697] [court is not to sit as a "super-legislature" altering criminal definitions].) The first factor - presence of an intervening different sexual offense - is based upon facts in cases which refused to apply section 654 to preclude multiple *sentences* for multiple convictions. Nothing in these cases can be read as restricting the number of violations which may occur. (*Hammon, supra*, 191 Cal.App.3d at p. 1096, citing *Perez, supra*, 23 Cal.3d at p. 552; *People v. Reeder, supra*, 152 Cal.App.3d at pp. 916-917.) And, as already indicated, *Hammon's* second factor - "sexual climax" - has never been dispositive in determining whether a sex offense is statutorily "completed." The last two items - "appreciable passage of time" and ***333** "reasonable opportunity for reflection" - were based on language in section 667.6, subdivision (d), which concerns imposition of mandatory consecutive

sentences upon certain sex offenders. [FN8] Nothing on the face of this section purports to affect the manner in which various sex crimes are to be defined in the first instance.

> FN8 Section 667.6, subdivision (d), *requires* a full consecutive term for each enumerated "violation" if, among other things, the crimes involve "the same victim on separate occasions." For purposes of making this determination under this subdivision, "the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior."

Further, we agree with that portion of Presiding Justice Kremer's opinion for the Court of Appeal in this case which highlights commonsense problems in the *Hammon* test (*supra*, 191 Cal.App.3d 1084): "Examined closely, [the] four criteria ... actually resolve to but one. The first criterion, ... separat [ion] by a different sexual offense[,] is always irrelevant to the problem presented since, by definition, one is considering a series of identical offenses *not* punctuated by others. The next two criteria, sexual climax and an appreciable passage of time[,] are actually factual circumstances from which one may conclude that the fourth criterion has occurred, a reasonable opportunity for reflection. *Hammon* then stands for the proposition [that] a series of identical sexual offenses may be said to be separate when ... one may reasonably conclude that the perpetrator has had a reasonable opportunity for reflection." However, as we noted earlier, this fourth factor was attributed to section 667.6, subdivision (d), where it helps determine whether consecutive *sentences* shall be imposed on defendants convicted of enumerated crimes, not whether separate crimes were committed. From a logical standpoint, the fact that only *some* multiple sex offenders *must* receive consecutive terms on the basis of a "reasonable opportunity for reflection" test suggests that *others* may at least be *convicted* of multiple sex offenses even in the *absence* of this factor. (4)**(See fn. 9.)** , (1d) We find the *Hammon* rationale unconvincing. [FN9] ***334**

> FN9 As an alternative to his contention that he committed but one sex offense as a matter of law, defendant urges that the trial court should at least have instructed *sua sponte* on factors similar to those identified in *Hammon*. We disagree. Defendant's suggested instruction provides that in order to convict defendant of "multiple counts of the same type of sexual misconduct" the jury must first find that defendant "intended to inflict and the victim did endure additional outrage to her/his person and feelings." It then goes on to list various "factors" to be used in making such a determination, including time between offenses, changes in location, sexual climax, intervening different sex acts, and the infliction of additional fear, danger or humiliation to the victim with each act.
>
> Obviously, there is no statutory basis for requiring proof that defendant harbored the specific intent to inflict "additional outrage," and that the victim demonstrably suffered such. This element is not mentioned in section 289, subdivision (a), which instead states that the act must be accomplished "for the purpose of sexual arousal, gratification, or abuse." It appears that defendant has read too much into introductory language in section 263, regarding the sufficiency of penetration in rape cases. ("The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape.") This language expresses the public harm which the statute is intended to forestall, and has not been viewed as an element of the crime per se. (See § 261, subds. (1)-(7).)

Finally, we note that despite its continuous recent activity in the area of sex offenses, including the addition of expansive amendments to section 289 (see fn. 7, *ante*), the Legislature has expressed no discernible objection to the steady increase in cases upholding multiple convictions based upon rapid, identical sex acts. For this and other reasons explained above, we find no support for defendant's contention that multiple, nonconsensual sex acts of an identical nature, committed in short succession against a single victim, constitute a single offense.

We hold that each of the digital penetrations committed in the course of defendant's assault upon Virginia N., and highlighted by intervening acts of force, constituted a separate violation of section 289 , subdivision (a). (5)(**See fn. 10.**) , (1e) Defendant thus properly sustained three separate convictions under that statute. [FN10] *Hammon, supra*, 191 Cal.App.3d 1084, is disapproved to the extent it conflicts with our analysis here.

FN10 Defendant's reliance on certain cases which describe the commission of multiple sex acts against one victim as a "single" or "continuous" crime is misplaced. (*People v. McIntyre* (1981) 115 Cal.App.3d 899, 910 [176 Cal.Rptr. 3]; *People* v. *Mota* (1981) 115 Cal.App.3d 227, 233 [171 Cal.Rptr. 212].)
These cases discuss the principles to be applied where the evidence reveals numerous crimes on numerous dates, any one of which could be the crime charged. The general rule in such cases is that (1) the prosecutor must elect which act is to support the charges; or (2) the jury must be instructed that it must unanimously agree as to which act defendant committed. (*People v. Castro* (1901) 133 Cal. 11, 12-13 [65 P. 13]; see also, CALJIC No. 17.01.) Such a rule ensures that all jurors agree beyond a reasonable doubt that defendant was guilty of the same act, and provides defendant with a reasonable opportunity to present a defense. (*People v. Williams* (1901) 133 Cal. 165, 168 [65 P. 323].) However, as noted in *McIntyre, supra*, 115 Cal.App.3d at pages 908-910, and *Mota, supra*, 115 Cal.App.3d at pages 231-234, an exception exists where a series of acts are part of the same, continuous transaction. (See *People v. Jefferson* (1954) 123 Cal.App.2d 219, 221 [266 P.2d 564].) In that situation, it is clear that the jury can agree that the crimes were all committed on a certain date, and defendant is not required to perform the near-impossible task of defending against numerous crimes on numerous dates which are not specified in the information.
The instant case does not implicate the foregoing "election" rule, or the "continuous conduct" exception. Defendant was charged with three counts of violating section 289, subdivision (a), on June 12, 1985, and he was convicted of those three crimes. Moreover, defendant overlooks the fact that *McIntyre* and *Mota* applied the continuous-conduct exception so as to *allow* conviction for multiple sex acts committed within a short space of time.

B. *Sentencing*

(2b) Defendant argues that even if he properly was *convicted* of each penetration, sentence on two of the convictions must be stayed under section 654. [FN11] His claim is rejected. ***335**

FN11 Section 654 provides: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

(6) It is well settled that section 654 protects against multiple punishment, not multiple conviction. (*People v. McFarland* (1962) 58 Cal.2d 748, 762 [26 Cal.Rptr. 473, 376 P.2d 449].) The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the "same act or omission." (See, e.g., *People v. Siko* (1988) 45 Cal.3d 820, 823-826 [248 Cal.Rptr. 110, 755 P.2d 294].) (7) However, because the statute is intended to ensure that defendant is punished "commensurate with his culpability" (*Perez, supra*, 23 Cal.3d at p. 551), its protection has been extended to cases in which there are several offenses committed during "a course of conduct deemed to be indivisible in time." (*People v. Beamon* (1973) 8 Cal.3d 625, 639 [105 Cal.Rptr. 681, 504 P.2d 905].)

(8) It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. (*In re Hayes* (1969) 70 Cal.2d 604, 609 [75 Cal.Rptr. 790, 451 P.2d 430]; see also *People* v. *Ratcliffe* (1981) 124 Cal.App.3d 808, 817-818 [177 Cal. Rptr. 627].) We

have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 [9 Cal.Rptr. 607, 357 P.2d 839].)

If, on the other hand, defendant harbored "multiple criminal objectives," which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, "even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*Beamon, supra*, 8 Cal.3d at p. 639.) Although the question of whether defendant harbored a "single intent" within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. (*Perez, supra*, 23 Cal.3d at p. 552, fn. 5.)

(2c) In *Perez, supra*, 23 Cal.3d 545, we held that section 654 did not preclude punishment for each sex crime (rape, sodomy, and 2 oral copulation counts) committed during a continuous 45-to-60-minute attack. Defendant argued that his offenses were part of an indivisible transaction, because they furthered his "single intent and objective of obtaining sexual gratification." (*Id.*, at p. 550.) We observed, however, that such a "broad and amorphous" view of the single "intent" or "objective" needed to trigger the statute would impermissibly "reward the defendant who has the greater ***336** criminal ambition with a lesser punishment." (*Id.*, at pp. 552-553.) Rather, in keeping with the statute's purpose, the proper view was to recognize that a "defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act." (*Id.*, at p. 553.) Accordingly, we declined "to extend the single intent and objective test of section 654" beyond the framework set forth in *Neal v. State of California, supra*, 55 Cal.2d at page 19, and its progeny. (23 Cal.3d at p. 553.) Since "[n]one of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental" to any other, section 654 did not apply. (*Id.*, at pp. 553-554.)

Here, defendant cites various cases applying section 654 in other contexts and makes the general argument that his three sex acts were part of a continuous "violent" transaction. (See, e.g., *People* v. *Bauer* (1969) 1 Cal.3d 368, 377 [82 Cal.Rptr. 357, 461 P.2d 637, 37 A.L.R.3d 1398] ["where a defendant robs his victim in one continuous transaction of several items of property, punishment for robbery on the basis of the taking of one of the items and [punishment for] other crimes [such as car theft or possession of contraband] on the basis of the taking of the other items is not permissible"].)

However, defendant's reliance on cases dealing with other "violent" crimes is misplaced. *Perez* acknowledged many of the same principles, but noted that there is "'no universal construction'" directing section 654's application in every instance. (23 Cal.3d at pp. 551-552 [citations omitted] & fn. 4.) *Perez* itself is the touchstone in determining how these general principles are to be applied to sex offenses. Indeed, the Courts of Appeal have routinely applied *Perez* to uphold separate sentences for each sex crime committed in a single encounter, even where closely connected in time. (See, e.g., *People* v. *Phillips, supra*, 169 Cal.App.3d at p. 642; *People* v. *Goldstein* (1982) 130 Cal.App.3d 1024, 1042 [182 Cal.Rptr. 207]; *People v. Boyce, supra*, 128 Cal.App.3d at p. 860; *People* v. *Singleton* (1980) 112 Cal.App.3d 418, 424 [169 Cal.Rptr. 333]; see also *People v. Rance, supra*, 106 Cal.App.3d at p. 255, fn. 3.)

Defendant insists, however, that *Perez, supra*, 23 Cal.3d 545 is limited in scope, and does not apply where wholly identical sex offenses have been committed in sequence. He claims that he can be punished only once because he harbored "one criminal intent" within the meaning of section 654 - to achieve sexual gratification by forcibly penetrating the victim's vagina with his finger. *Perez* , is distinguishable, he contends, because it involved a defendant who chose to satisfy his sexual urges by committing a variety of sex acts. ***337**

We note that *Perez* itself made no such factual distinction. Its section 654 analysis was directed to *any* case in which "a number of base criminal acts" were committed against a single victim. (23 Cal.3d at p. 553.) In light of the statute's purpose, no importance was placed on the instrumentality used

or body cavity penetrated. Our reasoning was also based, in part, upon two prior decisions of this court in which defendants had *repeated* certain sex crimes. For example, in *People v. Hicks* (1965) 63 Cal.2d 764, 766 [48 Cal.Rptr. 139, 408 P.2d 747], we held that section 654 did not preclude separate punishment for three sex offenses, even though defendant was convicted of *two* counts of oral copulation and one of sodomy against the same victim in the same sexual encounter. The same principle applied in *In re McGrew, supra*, 66 Cal.2d at pages 688 to 689, with regard to punishing defendant's conviction of *two* counts of rape and one of oral copulation.

Defendant correctly observes that neither *Hicks, supra*, 63 Cal.2d 764, nor *McGrew, supra*, 66 Cal.2d 685, informed us of the sequence in which the crimes were committed. He suggests that section 654 may not have applied in those cases because the two similar offenses may have been punctuated by the commission of a different offense. He also notes that in *Perez, supra*, 23 Cal.3d 545, defendant alternated the two crimes which happened to be of the same variety (i.e., oral copulation, sodomy, oral copulation, and then rape).

However, the Courts of Appeal have consistently rejected similar attempts to limit the holding of *Perez, supra*, 23 Cal.3d 545. These cases emphasize that no special treatment is to be afforded to a defendant under section 654 simply because he chose to repeat, rather than to diversify or alternate, his many crimes. (See, e.g., *People* v. *Marks, supra*, 184 Cal.App.3d at pp. 466- 467; *People* v. *Reeder, supra*, 152 Cal.App.3d at pp. 916-917; *People* v. *Sanchez, supra*, 131 Cal.App.3d at pp. 728-729; *People* v. *Van De Water* (1980) 108 Cal.App.3d 166, 169 [166 Cal.Rptr. 321]; *People v. Clem, supra*, 104 Cal.App.3d at pp. 346-347.)

We agree. No purpose is to be served under section 654 by distinguishing between defendants based solely upon the type *or* sequence of their offenses. Such an analysis would dispense punishment on the basis of the sexual taste or imagination of the perpetrator, and would not address the concerns raised in *Perez, supra*, 23 Cal.3d 545. To adopt such an approach would mean that "once a [defendant] has committed one particular sexual crime against a victim he may thereafter with impunity repeat his offense," so long as he does not direct attention to another place on the victim's body, or significantly delay in between each offense. (*People v. Reeder, supra*, 152 Cal.App.3d at p. 917.) However, it is defendant's intent to commit a number of separate base criminal acts upon his victim, and not the precise code ***338** section under which he is thereafter convicted, which renders section 654 inapplicable.

Finally, defendant insists that his case is special because only *one* sexual penetration would have occurred but for a fortuitous break in sexual activity. He argues that he is less culpable for section 654 purposes because it was *the victim's* efforts to defend herself which interrupted the initial vaginal penetration and caused subsequent repenetrations.

Under the facts of this case, we would be hard pressed to view the various breaks in vaginal penetration as "fortuitous." It is not surprising that a victim would struggle after she has been suddenly awakened from an early morning sleep by an intruder who rushes through the bedroom door, and begins to beat and sexually assault her.

Moreover, there is no legal or logical bar to separate punishment where, as here, *each of defendant's "repenetrations" was clearly volitional, criminal and occasioned by separate acts of force.* Defendant urges that no greater punishment should befall him simply because the initial offense was interrupted by the victim's struggle. By the same token, however, defendant should also not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his sexually assaultive behavior. As made clear under the *Perez-Hicks-McGrew* line of cases (cited *ante*, at p. 337), the nature and sequence of the sexual "penetrations" or offenses defendant commits is irrelevant for section 654 purposes. Whether defendant ends a break in the activity by renewing the same sex act (as here) or by switching to a new one (as in *Perez, supra*, 23 Cal.3d 545), the result under section 654 is the same.

We therefore decline to extend section 654 beyond the framework set forth in *Perez, supra*, 23 Cal.3d 545. As recognized by the courts below, section 654

does not preclude punishment for each of the sex offenses committed by defendant.

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Panelli, J., Kaufman, J., and Arguelles J., [FN*] concurred.

FN* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

Broussard, J., concurred in the judgment.

MOSK, J.

I concur in the judgment. In my view, defendant was properly convicted of three separate violations of Penal Code section 289 (hereinafter ***339** section 289) and was punished for each violation without offense to Penal Code section 654 (hereinafter section 654). Accordingly, I believe that the judgment of the Court of Appeal, which upheld the conviction and sentence in this regard, must be affirmed.

I cannot concur, however, in the majority's opinion.

I have serious doubt that the majority's discussion of section 289 is sound. [FN1] They interpret the provision to declare unqualifiedly that each time a person "causes the penetration, however slight, of the genital or anal openings of another person," he commits a separate and independent offense: "a *new and separate* violation of section 289 is 'completed' each time a *new and separate* 'penetration, however slight' occurs" (maj. opn., *ante* at p. 329, italics in original). They base their conclusion on the premise that "a violation of section 289 is 'complete' the instant 'slight' ' penetration' ... occurs." (*Ibid.*)

FN1 At the time relevant here, section 289 provided in pertinent part: "Every person who causes the penetration, however slight, of the genital or anal openings of another person, by any foreign object, substance, instrument, or device when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person for the purpose of sexual arousal, gratification, or abuse, shall be punished by imprisonment in the state prison for three, six, or eight years." (Former Pen. Code, § 289, subd. (a), Stats. 1982, ch. 1111, § 6, p. 4026.) For purposes here, the provision in its current form is to the same effect.

I believe that the statutory provision may properly be interpreted to declare that each penetration constitutes a separate offense *in the general case*. But I find it hard to believe that the provision can be read - as it is read by the majority - to declare that each penetration constitutes a separate offense *in all cases and under all circumstances as a matter of law*. Certainly, such an interpretation is not supported by the premise relied on: as the relevant language and its history reveal, the phrase, "penetration, however slight," was intended to distinguish between an attempt and the completed crime, not between one completed crime and another. Moreover, such an interpretation could readily yield untenable results in individual cases.

I also have serious doubt that the majority's discussion of section 654 is sound. [FN2] They present an extended and intricate analysis to support their conclusion that the provision is inapplicable to the case at bar. In my view, such an analysis is unnecessary. Here, defendant committed not one but *three* acts of penetration, each interrupted by a distinct violent assault. Thus ***340** section 654, which governs when there is a single "act," does not apply. But even if the three acts could be deemed to constitute a single "act" for present purposes, the result would be the same. Section 654 is operative when there is an "act" that is made punishable "in different ways by different provisions" of the Penal Code. The "act" here, however, is made punishable only in one way by one provision.

FN2 Section 654 provides in relevant part: "An act or omission which is made punishable in different ways by different provisions of this code [i.e., the Penal Code] may be punished under either of such provisions, but in no case can it be punished under more than one ...."

For the foregoing reasons, although I concur in the

majority's disposition I cannot concur in their reasoning. ***341**

Cal.,1989.

People v. Harrison

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Briefs and Other Related Documents

Supreme Court of California

The PEOPLE, Plaintiff and Respondent,
v.
Cruz Alberto MENDOZA et al., Defendants and Appellants.

No. S067104.

July 31, 2000.
Rehearing Denied Sept. 13, 2000. [FN*]

FN* Mosk, J., Kennard, J., and Werdegar, J., dissented.

Defendants were convicted by separate juries in the Superior Court, Marin County, No. SC39946, William H. Stephens, J., of murder during a robbery or burglary. Defendants appealed. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court, Chin, J., held that statute reducing the degree of the crime if defendant is convicted of a crime which is distinguished into degrees but the trier of fact does not find the degree of the crime was inapplicable, overruling *McDonald*, 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, and abrogating *Escobar*, 48 Cal.App.4th 999, 55 Cal.Rptr.2d 883, and *Dailey*, 47 Cal.App.4th 747, 55 Cal.Rptr.2d 171.

Affirmed.

Mosk, J., filed a dissenting opinion.

Kennard, J., filed a dissenting opinion in which Werdegar, J., concurred.

Werdegar, J., filed a dissenting opinion.

Opinion, 69 Cal.Rptr.2d 664, vacated.

West Headnotes

[1] Statutes 181(1)
361k181(1) Most Cited Cases

[1] Statutes 184
361k184 Most Cited Cases

The court's fundamental task in interpreting a statute is to ascertain the Legislature's intent so as to effectuate the law's purpose.

[2] Statutes 188
361k188 Most Cited Cases

The court begins its inquiry regarding legislative intent by examining the statute's words, giving them a plain and commonsense meaning.

[3] Statutes 205
361k205 Most Cited Cases

The court does not consider statutory language in isolation; rather, it looks to the entire substance of the statute in order to determine the scope and purpose of the provision.

[4] Statutes 208
361k208 Most Cited Cases

The court must harmonize the various parts of a statutory enactment by considering the particular clause or section in the context of the statutory framework as a whole.

[5] Statutes 181(2)
361k181(2) Most Cited Cases

[5] Statutes 212.3
361k212.3 Most Cited Cases

The court must avoid a statutory construction that would produce absurd consequences, which the court presumes the Legislature did not intend.

[6] Homicide 1553
203k1553 Most Cited Cases
(Formerly 203k313(1))

Where the trial court correctly instructs the jury only on first degree felony murder and to find the defendant either not guilty or guilty of first degree murder, then as a matter of law the only crime of which the defendant may be convicted is first degree murder, and the question of degree is not before the jury, so that defendant is not "convicted of a crime which is distinguished into degrees," within meaning of statute providing that a defendant is deemed to have been convicted of the lesser degree if the defendant is convicted of a crime which is distinguished into degrees but the trier of fact did not find the degree of the crime; overruling *People v. McDonald*, 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, and abrogating *People v. Escobar*, 48 Cal.App.4th 999, 55 Cal.Rptr.2d 883, and *People v. Dailey*, 47 Cal.App.4th 747, 55 Cal.Rptr.2d 171. West's Ann.Cal.Penal Code §§ 189, 1157.

[7] Homicide 576

203k576 Most Cited Cases
(Formerly 203k18(1))
The first degree felony-murder rule is a creature of statute. West's Ann.Cal.Penal Code § 189.

[8] Homicide 580
203k580 Most Cited Cases
(Formerly 203k22(1))
When the prosecution establishes that a defendant killed while committing one of the felonies listed in the felony-murder statute, by operation of statute the killing is deemed to be first degree murder as a matter of law, and there are no other degrees of such a murder. West's Ann.Cal.Penal Code § § 189, 1157.

[9] Homicide 585
203k585 Most Cited Cases
(Formerly 203k307(4))

[9] Homicide 1333
203k1333 Most Cited Cases
(Formerly 203k307(4))
Where the evidence points indisputably to a killing committed in the perpetration of one of the felonies listed in the felony-murder statute, the only guilty verdict a jury may return is first degree murder, and thus, a trial court is justified in withdrawing the question of degree of murder from the jury and instructing it that the defendant is either not guilty, or is guilty of first degree murder. West's Ann.Cal.Penal Code § § 189, 1157.

[10] Homicide 1376
203k1376 Most Cited Cases
(Formerly 203k307(3))

[10] Homicide 1456
203k1456 Most Cited Cases
(Formerly 203k307(3))
The trial court need not instruct the jury on offenses other than first degree felony murder or on the differences between the degrees of murder, where the evidence points indisputably to a killing committed in the perpetration of one of the felonies listed in the felony-murder statute, because the only guilty verdict a jury may return is first degree murder. West's Ann.Cal.Penal Code § § 189, 1157; CALJIC 8.70.

[11] Jury 34(1)
230k34(1) Most Cited Cases
(Formerly 203k307(3))
Where the evidence established as a matter of law that the felony-murder during a robbery or burglary was of the first degree, the failure to instruct the jury on offenses other than first degree felony-murder or on the differences between the degrees of murder did not violate either the right to have a jury determine questions of fact or the constitutional right to have a jury determine every material issue the evidence presents. West's Ann.Cal.Penal Code § § 189, 1126, 1157.

[12] Criminal Law 887
110k887 Most Cited Cases
If the trial court correctly instructs the jury only on first degree felony-murder and to find the defendant either not guilty or guilty of first degree murder, but the jury returns a verdict for a crime other than first degree murder, the trial court must refuse to accept the verdict because it is contrary to law, and must direct the jury to reconsider. West's Ann.Cal.Penal Code § § 189, 1157.

[13] Statutes 217.3
361k217.3 Most Cited Cases
Where a statute proposed by the California Code Commission for inclusion in the Penal Code of 1872 was enacted by the Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature.

[14] Criminal Law 883
110k883 Most Cited Cases
Purpose of statute providing that a defendant is deemed to have been convicted of the lesser degree if the defendant is convicted of a crime which is distinguished into degrees but the trier of fact did not find the degree of the crime is to ensure that where a verdict other than first degree is permissible, the jury's determination of degree is clear. West's Ann.Cal.Penal Code § 1157.

[15] Courts 107
106k107 Most Cited Cases
A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided.

[16] Courts 91(.5)
106k91(.5) Most Cited Cases

[16] Courts 107
106k107 Most Cited Cases
Only the ratio decidendi of an appellate opinion has precedential effect.

[17] Courts 92
106k92 Most Cited Cases
The Supreme Court must view with caution seemingly categorical directives not essential to earlier decisions and be guided by dictum only to the extent it remains analytically persuasive.

[18] Statutes 212.5
361k212.5 Most Cited Cases
As a general rule, in construing statutes, the court presumes the Legislature intends to change the meaning of a law when it alters the statutory language, as for example when it deletes express provisions of the prior version.

[19] Statutes 212.5
361k212.5 Most Cited Cases
The repeal of a prior statute, together with enactment of a new law on the same subject with an important limitation deleted, strongly suggests that the Legislature intended to change the law.

[20] Homicide 1553
203k1553 Most Cited Cases
(Formerly 203k313(1))
The Legislature's repeal of statute imposing a duty on the jury to make a degree finding in every case in which "any person" was "indicted for murder," and enactment of a new statute on the same subject, providing that a jury finding of degree is required only if a defendant is convicted of a crime which is distinguished into degrees, strongly suggested the legislature intended to change the law, and the inference of legislative intent to change the law was particularly compelling because the legislature knew that the omitted phrases were significant to the Supreme Court's earlier decision in *Campbell*. West's Ann.Cal.Penal Code § 1157.

[21] Courts 100(1)
106k100(1) Most Cited Cases
Legislature did not acquiesce in Supreme Court's *McDonald* decision, which held that the jury's failure to specify the degree of murder in its verdict rendered the conviction second degree murder by operation of law, by remaining silent after the *McDonald* decision, and thus, the Supreme Court would revisit the *McDonald* decision's interpretation of the statute generally requiring the jury to determine the degree of the crime. West's Ann.Cal.Penal Code § 1157.

[22] Courts 100(1)
106k100(1) Most Cited Cases
Legislature's consideration of, but failure to enact, statutory amendments that would have superseded the Supreme Court's *McDonald* decision, which held that the jury's failure to specify the degree of murder in its verdict rendered the conviction second degree murder by operation of law, did not indicate legislative acquiescence, and thus, the Supreme Court would revisit the *McDonald* decision's interpretation of the statute generally requiring the jury to determine the degree of the crime. West's Ann.Cal.Penal Code § 1157.

[23] Criminal Law 304(9)
110k304(9) Most Cited Cases
Supreme Court would take judicial notice of legislative materials relating to unpassed bills which, if enacted, would have superseded the Supreme Court's *McDonald* holding that the jury's failure to specify the degree of murder in its verdict rendered the conviction second degree murder by operation of law, where the requests for judicial notice were unopposed and the materials were offered for purposes of construing the statute generally requiring the jury to determine the degree of the crime. West's Ann.Cal.Penal Code § 1157.

[24] Statutes 220
361k220 Most Cited Cases
Unpassed bills, as evidences of legislative intent, have little value.

[25] Statutes 220
361k220 Most Cited Cases
The Legislature's failure to enact a proposed statutory amendment may indicate many things other than approval of a statute's judicial construction, including the pressure of other business, political considerations, or a tendency to trust the courts to correct their own errors.

[26] Statutes 220
361k220 Most Cited Cases
The court can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law.

[27] Courts 89
106k89 Most Cited Cases
The court must construe the language of a judicial opinion with reference to the facts the case presents, and the positive authority of a decision is coextensive only with such facts.

[28] Courts 90(1)
106k90(1) Most Cited Cases
Because of the need for certainty, predictability, and stability in the law, the Supreme Court does not lightly overturn its prior opinions.

[29] Courts 90(1)
106k90(1) Most Cited Cases
The policy of stare decisis does not shield court-created error from correction, but is a flexible one that permits the court to reconsider, and ultimately to depart from, its own prior precedent in an appropriate case.

[30] Courts 89
106k89 Most Cited Cases
A key consideration in determining the role of stare decisis is whether the decision being reconsidered has become a basic part of a complex and comprehensive statutory scheme, or is simply a specific, narrow ruling that may be overruled without affecting such a statutory scheme.

[31] Courts 90(1)
106k90(1) Most Cited Cases
Stare decisis did not mandate continued adherence to the Supreme Court's *McDonald* decision, which held that the jury's failure to specify the degree of murder in its verdict rendered the conviction second degree

murder by operation of law, where the decision set forth a narrow rule of limited applicability that had not become a basic part of any comprehensive statutory scheme. West's Ann.Cal.Penal Code § 1157.

|32| **Criminal Law** 100(1)
110k100(1) Most Cited Cases
Defendants had no cognizable reliance interest in obtaining a verdict of second degree murder by the means set forth in the Supreme Court's *McDonald* decision, which held that the jury's failure to specify the degree of murder in its verdict rendered the conviction second degree murder by operation of law, and they could not claim that their defense against felony-murder charges would have been conducted differently absent *McDonald*, and thus, the Supreme Court's overruling of *McDonald* in the defendants' case could be applied to the defendants. West's Ann.Cal.Penal Code § § 189, 1157.

|33| **Constitutional Law** 253(4)
92k253(4) Most Cited Cases

|33| **Courts** 100(1)
106k100(1) Most Cited Cases
Due process principles did not prevent the Supreme Court from applying, in defendants' appeal of their convictions for felony-murder, the Supreme Court's overruling of its *McDonald* decision, which had held that the jury's failure to specify the degree of murder in its verdict rendered the conviction second degree murder by operation of law, because the overruling of *McDonald* neither expanded criminal liability nor enhanced punishment for conduct previously committed. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Penal Code § § 189, 1157.

***435 *899 **269** William D. Farber, San Rafael, under appointment by the Supreme Court, for Defendant and Appellant Cruz Alberto Mendoza.

David McNeil Morse, San Francisco, under appointment by the Supreme Court, for Defendant and Appellant Raul Valle.

***900** Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Stan M. Helfman and John R. Vance, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

CHIN, J.

Under Penal Code section 1157, [FN1] "[w]henever a defendant is convicted of a crime ... which is distinguished into degrees," the trier of fact "must find the degree of the crime ... of which he is guilty. Upon the failure of the [trier of fact] to so determine, the degree of the crime ... of which the defendant is guilty, shall be deemed to be of the lesser degree." Here, we consider this section's applicability under the following circumstances: (1) the prosecution's only murder theory at trial is that the killing was committed during perpetration of robbery or burglary, which is first degree murder as a matter of law (§ 189); (2) the court properly instructs the jury to return either an acquittal or a conviction of first degree murder; and (3) the jury returns a conviction for murder, but its verdict fails to specify the murder's degree. We conclude that under these circumstances, section 1157 does not apply because the defendant has not been "convicted of a crime ... which is distinguished into degrees" within ***436** the meaning of that section. Thus, the conviction is not "deemed to be of the lesser degree." (§ 1157.) We therefore affirm the Court of Appeal's judgment.

FN1. Unless otherwise indicated, all further statutory references are to the Penal Code.

FACTS

On September 22, 1992, the Marin County Grand Jury returned an indictment accusing defendants Cruz Alberto Mendoza and Raul Antonio Valle of, among other crimes, "[m]urder in violation of Section 187(A)," second degree robbery (§ 211), and burglary (§ 459). These charges arose out of the killing of Pastor Dan Elledge at The Lord's Church in Novato, California. As special circumstances for sentencing purposes, the indictment also alleged that defendants committed murder while they were engaged in committing robbery and burglary. (§ 190.2, subd. (a)(17).)

After the trial court granted defendants' motion for separate trials, the prosecution presented its evidence against defendants simultaneously to separate juries. As to both defendants, the prosecution's only murder theory was that Valle and Mendoza shot and killed Pastor Elledge while burglarizing and robbing The Lord's Church (as one in a series of church robberies). Under section 189, all murder committed "in the perpetration of" robbery or ***901** burglary "is murder of the first degree." After the close of evidence, the trials proceeded independently for purposes of jury instruction, closing arguments, and return of the verdicts.

A. Mendoza Proceedings

In his defense, Mendoza, who admitted committing other crimes with (and without) Valle, maintained he never entered The Lord's Church and did not participate in any of the crimes Valle committed there, including Pastor Elledge's killing. In connection with the charge for that killing, Mendoza did not contend the jury could convict him of a degree or form of criminal homicide other than first degree felony murder. Nor did he ask the trial court to instruct the jury on lesser included offenses; his counsel agreed that because the prosecution had presented only a first degree felony-murder case, instructions relating to specific intent for other forms of first degree murder were unnecessary. Thus, Mendoza's counsel expressly declined to request instructions on malice aforethought and premeditation and deliberation. ****270** At other points during the discussion of the instructions, Mendoza's counsel expressed his understanding that the prosecution's only murder theory was first degree felony murder.

Consistent with these proceedings, the trial court instructed Mendoza's jury only on first degree felony murder as follows: "The defendant is accused in Count One of the indictment of having committed the crime of murder, a violation of Penal Code Section 187. [¶] Every person who unlawfully kills a human being during the commission or attempted commission of robbery or burglary is guilty of the crime of murder, in violation of Section 187 of the Penal Code. [¶] For clarification, that is one definition, that is not the only definition of murder, it's the only one that applies to the facts of this case. [¶] In order to prove such crime, each of the following elements must be proved: A human being was killed; the killing was unlawful; and the killing occurred during the commission or attempted commission of robbery or burglary. [¶] The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery or burglary, is murder of the first degree when the perpetrator had the specific intent to commit such crime. [¶] The specific intent to commit robbery or burglary and the commission or attempted commission of such crime must be proved beyond a reasonable doubt. [¶] If a human being is killed by a person engaged in the commission or attempted commission of the crimes of robbery or burglary, all persons who either personally committed the robbery or burglary, *****437** or who aided and abetted the robbery or burglary, are guilty of murder in the first degree, whether the killing is intentional, unintentional, or ***902** accidental. [¶] For purposes of determining whether a person is guilty of murder in the first degree, a defendant who does not form an intent to aid and abet a participant in a robbery or burglary before a murder has occurred is not guilty of murder in the first degree. [¶] Thus, if you have a reasonable doubt whether Defendant Mendoza was the actual killer, you may not convict him of murder in the first degree unless the prosecution proves beyond a reasonable doubt that he formed the intent to aid and abet in the robbery before the murder occurred. [¶] If you find the defendant in this case guilty of murder in the first degree, you must then determine if one or more of the [alleged] special circumstances are true or not true."

The court also gave the following instruction: "In order to find the defendant guilty of the crime of murder, as charged in Count One, you must be satisfied beyond a reasonable doubt that, first, the crimes of robbery and burglary, charged in Counts Two and Three, were committed; and, second, the defendant aided and abetted such crimes; and, third, a co-principal in such crime committed the crimes of robbery or burglary as charged in Counts Two and Three; and, fourth, the crime of murder was a natural and probable consequence of the commission of the crimes of robbery or burglary as charged in Counts Two and Three."

In addition, in instructing on the "lesser crime[s]" of which the jury could convict Mendoza if it found him not guilty of the charged crimes, the court did not mention any form of criminal homicide other than first degree felony murder. Consistent with these instructions, the verdict forms the court submitted to the jury did not give the jury the option to convict defendant of second degree murder or any other form of criminal homicide.

During its closing argument to the jury, the prosecution reaffirmed its focus on only first degree felony murder, explaining: "In order to find the defendant guilty of the crime of murder as charged [in] this Count 1, you must be satisfied beyond a reasonable doubt, folks, of the following: [¶] The crimes of robbery or burglary ... were committed, that the defendant aided and abetted such crimes. I submit to you [he] not only aided and abetted but he actively participated as well in those crimes, a co-principal in such crime committed, the crimes of robbery or burglary as charged in Counts II or III with ... Valle, and the crime of murder was a natural and probable consequence of the commission of the crimes of robbery or burglary as charged in Count II and III." The ****271** prosecution further explained:

"Murder has been defined for you.... In this case it is the killing which occurred during the commission ... or attempted commission of a robbery or burglary. It is a first degree murder where the unlawful killing of a human being whether intentional, unintentional or accidental occurs during the ***903** commission or an attempted commission of the crime of robbery or burglary. And that is murder in the first degree when the perpetrator had the specific intent to commit the crime of either the robbery or the burglary. [¶] So, if you folks find that Mr. Mendoza was perpetrating a burglary and Mr. Valle [was] perpetrating a burglary and/or a robbery and that Pastor Elledge was killed during the commission of those crimes, [then] he is guilty of first degree felony murder. And that is what the People submit to you the proof beyond a reasonable doubt shows in this case."

As a transition to discussing the special circumstances instructions, the prosecution then remarked: "Now, there's an instruction separate from the first degree murder which is the felony murder which we just discussed with the instruction." In summing up, the prosecution asserted that the evidence proved beyond a reasonable doubt that Mendoza was "guilty of first degree murder" in connection with Pastor *****438** Elledge's killing because he entered The Lord's Church "with the intent to perpetrate a robbery and a burglary of that church." The prosecution concluded by insisting that Mendoza was "legally responsible for the felony murder of Dan Elledge."

Mendoza's counsel began his closing argument by telling the jury: "Your job is to decide whether Alberto Mendoza is guilty of first degree murder at The Lord's Church on August 26th, 1992.... [¶] This case is not about whether Mr. Mendoza is guilty of the robberies in Cerritos, Fairfield, San Jose or San Rafael. He's admitted to you his guilt for those crimes. What it is about and the main decision you will have to make is whether he is guilty of the first degree murder that is charged in Novato at The Lord's Church." Defense counsel also stressed the prosecution's assertion that "[i]t's all or nothing," i.e., that the prosecution has "either proven to you that [Mendoza] was in there doing this crime with [Valle] beyond a reasonable doubt, or he's not guilty." In summing up, defense counsel argued: "So, has the District Attorney proven Alberto Mendoza guilty beyond a reasonable doubt of first degree murder? I say that he has not." Counsel concluded: "You should acquit Mr. Mendoza of first degree murder. He did not burglarize The Lord's Church. He did not rob Daniel Elledge. He did not kill Daniel Elledge. He is innocent of these crimes."

The jury found Mendoza "guilty of the offense charged in Count I, a felony, to wit, murder in violation of Section 187(a) of the Penal Code of the State of California." After the clerk read this verdict aloud, the court asked each juror to indicate " 'yes' or 'no' whether or not that was your vote on the charge of murder 187 first degree." Each juror answered, "Yes." The clerk then announced the jury's true findings regarding the special circumstances, i.e., that Pastor Elledge's murder "was committed by the defendant Alberto ***904** Mendoza while [he] was engaged in the commission of the crime of robbery" and "in the commission of the crime of burglary in the second degree." As to the other charges arising from the events at The Lord's Church, the clerk also read the jury's guilty verdicts on burglary and second degree robbery. At the penalty phase of the trial, the jury found that Mendoza's penalty should be life in prison without possibility of parole, rather than death. The trial court subsequently entered a judgment against Mendoza for first degree murder and sentenced him in accordance with the jury's finding. The Court of Appeal affirmed the judgment.

B. Valle Proceedings

At trial, Valle conceded his guilt of all substantive charges but contested the special circumstances allegations. Thus, he *admitted* having committed first degree felony murder (as well as burglary and robbery) with Mendoza at The Lord's Church. However, he maintained Mendoza had fired the fatal gunshots. Based on this contention, Valle also argued that at the time of the murder, he lacked the mental state a mere ****272** participant must have for a true finding on the special circumstances allegations. In making this argument, he relied on evidence that at the time of the murder, he suffered from posttraumatic stress syndrome related to prior combat experiences in El Salvador.

Consistent with the prosecution's theory and Valle's defense, the trial court instructed Valle's jury only on first degree felony murder as follows: "The defendant is accused in Count One of the Indictment of having committed the crime of murder, a violation of Penal Code Section 187. [¶] Every person who unlawfully kills a human being during the commission or attempted commission of robbery or burglary, is guilty of the crime of murder, in violation of Section 187 of the Penal Code. [¶] In order to prove such crime, each of the following elements

must be proved: First, a human being was killed; second, the killing was unlawful; and third, the ***439** killing occurred during the commission or attempted commission of robbery or burglary. [¶] The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery or burglary, is murder of the first degree when the perpetrator had the specific intent to commit such crime. [¶] The specific intent to commit robbery or burglary and the commission or attempted commission of such crime must be proved beyond a reasonable doubt. [¶] In order for an accused to be guilty of murder as an aider and abettor of a burglary, he must have formed the intent to encourage or facilitate the perpetrator prior to or at the time the perpetrator entered [T]he Lord's Church with the required specific intent. [¶] For an accused to be guilty of ... murder, as an aider and abettor to a robbery, he must have ***905** formed the intent to encourage or facilitate the robbery prior to or during the commission of the robbery. [¶] If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery or burglary, all persons who either directly or actively commit the act constituting such crimes, or with knowledge of the unlawful purpose of the perpetrator of the crimes, and with the intent or purpose of committing, encouraging or facilitating the commission of the offenses, aids, promotes, encourages or instigates by act or advice its commission, are guilty of murder of the first degree whether the killing is intentional, unintentional, or accidental. [¶] If you find the defendant in this case guilty of murder of the first degree, you must determine if one or more of the [alleged] special circumstances are true or not true." As in Mendoza's trial, the trial court's instructions on the "lesser crime[s]" of which the jury could convict Valle if it found him not guilty of the charged crimes did not mention either second degree murder or any other form of criminal homicide.

During closing argument, the prosecutor, after again reading to the jury the court's instruction on first degree murder, stated: "It is clear from any interpretation of the evidence in this case that the defendant is guilty of first degree murder under this felony murder theory. Clearly he entered [The Lord's Church] with the intent to commit theft, he admitted that to his own doctors." The prosecutor also reiterated that for the first degree felony-murder rule to apply, the killing "can be unintentional or accidental. Which, in relation to the discharge of the firearm by this defendant, we argue to you was not accidental.... But in any event, it's clear that he's guilty of the first degree murder...." Later, the prosecutor explained that he was "not asking you to find [Valle] guilty of any lesser included offenses." The prosecutor closed by asserting that Valle "is responsible as the actual killer, of first degree murder of Dan Elledge, and that the special circumstances of committing that murder in the first degree during the commission of a burglary and robbery are true...." In his rebuttal, the prosecutor again asserted that he had proven beyond a reasonable doubt every element and issue of "the first degree murder on the felony murder theory."

Defense counsel began her closing argument by explaining that she would not "spend any time telling you that ... the prosecution, has not proven their case with regard to the robberies, the burglaries, and even the felony murder." Counsel then focused the jury's attention on the difference ****273** between first degree felony murder and the alleged special circumstances, explaining: "[W]hat I want to point out is that when you look at the special circumstances, at first it appears that the felony murder and the special circumstance are the same thing because you find first degree murder by the felony ***906** murder theory, or the felony murder rule, if you're involved in the commission of a felony in someone's eyes, even if it's accidental, it's first degree murder. [¶] And then you turn to the special circumstance...." ***440** She later explained that the special circumstance of committing murder while engaged in a robbery or burglary, which must be considered " '[i]f you find Mr. Valle guilty of murder in the first degree,' " "looks a lot like the vehicle which just got you to first degree murder, which is the felony murder rule." She later repeated that "robbery and then death resulting is recognized [under the law] by the felony murder rule. That's how you get to first degree murder...." In concluding, counsel asked the jury to find the special circumstances allegations not true, while she conceded that Valle was "guilty of ... the felony murder of Dan Elledge because he was in there when someone died. He was participating in a felony first degree murder robbery."

After closing arguments, the court discussed the verdict forms with counsel. Defense counsel began by asserting that a proposed verdict form on the murder charge contained "a mistake" because it was "a verdict form for premeditated and deliberate murder under [section] 187(a)...." Counsel argued that the form "should read, 'Murder, in violation of Section 189 ... in that the murder was committed

while the defendant was engaged in the commission of a felony, to wit, robbery and/or burglary.' And that would be felony murder under [section] 189." In reply to the court's request that she explain this proposal, counsel replied: "Because ... that's the theory of the case, that's what we've talked about, that's what's been put on...." Counsel continued: "[M]y concern is with the felony murder language.... [¶] ... I think what it should say is ... that, 'to wit, this murder was committed during the commission of a felony,' that it's clear they're finding ... a murder based on felony murder.... [¶] There's been so much discussion about--I mean, and the whole theory is that the murder is found by the killing happening during the commission of a felony.... [¶] So I think it should be clear to [the jurors] at the time that they are--they are dealing with the verdict on murder or not that it's felony murder, and that's exactly what they're finding."

The prosecution objected to defense counsel's proposal, asserting that a verdict form should never refer to "the theory" or "theories" of the murder. It also explained: "In this case, there is only one theory, so there can't be any confusion as to what [the jury's] finding is, it has to be in the commission of a felony." Apparently agreeing with the prosecution, the court then denied defendant's request that the verdict form refer to the prosecution's legal theory. As in Mendoza's trial, the verdict forms the court submitted to Valle's jury did not give it the option to return a verdict for second degree murder or any lesser form of criminal homicide.

***907** The jury found Valle "guilty of the offense charged in Count I, a felony, to wit, murder in violation of Section 187(a)...." It also found him guilty of second degree robbery and burglary, and found true the special-circumstances allegations that he had committed the murder while committing robbery and burglary. After the clerk read these findings aloud, the court asked each juror: "With respect to the verdict of the jury in Count I, a violation of Section 187 ..., murder, the finding of guilty, was that your individual verdict ... ?" Each juror answered, "Yes." At the penalty phase of the trial, the jury found that Valle's penalty should be life in prison without possibility of parole, rather than death. The trial court subsequently entered a judgment against Valle for first degree murder and sentenced him in accordance with the jury's finding. The Court of Appeal affirmed the judgment.

DISCUSSION

The issue here is the proper construction of section 1157, which the Legislature first enacted as part of the Penal Code of 1872. As originally enacted, section 1157 provided: ****274** "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of *****441** the crime of which he is guilty." In 1951, the Legislature amended this language to make the statute apply "[w]henever a defendant is convicted of a crime which is distinguished into degrees...." (Stats.1951, ch. 1674, § 109, p. 3849.) As relevant here, the statutory language has remained unchanged since. [FN2] Thus, the threshold question we must consider is whether, under the facts and circumstances we have set forth above, defendants were "convicted of a crime ... which is distinguished into degrees" within the meaning of section 1157. If they were not, then the statute does not apply. [FN3]

> FN2. In 1978, the Legislature added language referencing attempts to commit crimes. (Stats.1978, ch. 1166, § 4, p. 3771.)
>
> FN3. Justice Kennard errs in asserting that section 1157 applies "whenever a crime is 'distinguished into degrees.' " (Dis. opn. of Kennard, J., *post,* 98 Cal.Rptr.2d at p. 458, 4 P.3d at p. 289.) Since its 1951 amendment, the statute has applied by its terms only "[w]henever a defendant *is convicted of* a crime ... which is distinguished into degrees." (§ 1157, italics added.)

[1][2][3][4][5] Our fundamental task in making this determination is to ascertain the Legislature's intent so as to effectuate the law's purpose. (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, 88 Cal.Rptr.2d 19, 981 P.2d 944.) We begin our inquiry by examining the statute's words, giving them a plain and commonsense meaning. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476, 66 Cal.Rptr.2d 319, 940 P.2d 906.) In doing so, however, we do not consider the statutory language "in isolation." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299.) Rather, we look to "the entire substance of the statute ... in order to determine the ***908** scope and purpose of the provision.... [Citation.]" (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 608, 86 Cal.Rptr. 793, 469 P.2d 665.) That is, we construe the words in question " 'in context, keeping in mind the nature and obvious purpose of the statute....' [Citation.]" (*Ibid.*) We must harmonize "the various parts of a statutory enactment ... by considering the particular clause or section in the

context of the statutory framework as a whole." (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, 110 Cal.Rptr. 144, 514 P.2d 1224; see also *Woods v. Young* (1991) 53 Cal.3d 315, 323, 279 Cal.Rptr. 613, 807 P.2d 455; *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 91, 255 Cal.Rptr. 670, 767 P.2d 1148; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387, 241 Cal.Rptr. 67, 743 P.2d 1323.) We must also avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246, 40 Cal.Rptr.2d 903, 893 P.2d 1224; *People v. Jeffers* (1987) 43 Cal.3d 984, 998-999, 239 Cal.Rptr. 886, 741 P.2d 1127; *In re Head* (1986) 42 Cal.3d 223, 232, 228 Cal.Rptr. 184, 721 P.2d 65.)

[6][7][8] Applying these principles, we conclude that defendants were not "convicted of a crime ... which is distinguished into degrees" within the plain and commonsense meaning of section 1157. We begin by considering the nature of felony murder. In California, the first degree felony-murder rule "is a creature of statute." (*People v. Dillon* (1983) 34 Cal.3d 441, 463, 194 Cal.Rptr. 390, 668 P.2d 697 (*Dillon*).) When the prosecution establishes that a defendant killed while committing one of the felonies section 189 lists, "by operation of the statute the killing is deemed to be first degree murder as a matter of law." (*Dillon, supra,* 34 Cal.3d at p. 465, 194 Cal.Rptr. 390, 668 P.2d 697; see also *People v. Rogers* (1912) 163 Cal. 476, 483, 126 P. 143 [§ 189 "in terms makes ... a killing" committed during robbery "murder of the first degree"].) Thus, there are no degrees of such murders; as a matter of law, a conviction for a killing committed during a robbery or burglary can *only* be a conviction for first degree murder.

***442** [9][10][11][12] That such murders can only be of the first degree has several significant consequences at trial. Where the evidence points indisputably to a killing committed in the perpetration of one of the felonies section 189 lists, the *only* guilty verdict a jury may return ****275** is first degree murder. (*People v. Jeter* (1964) 60 Cal.2d 671, 675, 36 Cal.Rptr. 323, 388 P.2d 355; *People v. Lessard* (1962) 58 Cal.2d 447, 453, 25 Cal.Rptr. 78, 375 P.2d 46; *People v. Perkins* (1937) 8 Cal.2d 502, 516, 66 P.2d 631.) Under these circumstances, a trial court "is justified in withdrawing" the question of degree "from the jury" and instructing it that the defendant is either not guilty, or is guilty of ***909** first degree murder. (*People v. Riser* (1956) 47 Cal.2d 566, 581, 305 P.2d 1.) The trial court also need not instruct the jury on offenses other than first degree felony murder or on the differences between the degrees of murder. (*People v. Rupp* (1953) 41 Cal.2d 371, 382, 260 P.2d 1; *People v. Bernard* (1946) 28 Cal.2d 207, 214, 169 P.2d 636.) Nor need it give CALJIC No. 8.70, which provides: "Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree." [FN4] (*People v. Morris* (1991) 53 Cal.3d 152, 211, 279 Cal.Rptr. 720, 807 P.2d 949, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1, 38 Cal.Rptr.2d 394, 889 P.2d 588.) Because the evidence establishes as a matter of law that the murder is of the first degree, these procedures violate neither the right under section 1126 to have a jury determine questions of fact (*People v. Sanford* (1949) 33 Cal.2d 590, 595, 203 P.2d 534) nor the constitutional right to have a jury determine every material issue the evidence presents. (See *People v. Thornton* (1974) 11 Cal.3d 738, 769, fn. 20, 114 Cal.Rptr. 467, 523 P.2d 267, disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12, 160 Cal.Rptr. 84, 603 P.2d 1.) Finally, if, under these circumstances, a jury returns a verdict for a crime other than first degree murder, the trial court must refuse to accept the verdict because it is contrary to law, and must direct the jury to reconsider. (Cf. *People v. Scott* (1960) 53 Cal.2d 558, 561-562, 2 Cal.Rptr. 274, 348 P.2d 882, disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 648-649, 36 Cal.Rptr. 201, 388 P.2d 33.)

> FN4. Consistent with these principles, the Use Note to CALJIC No. 8.70 states in part: "If the only theory of murder supported by the evidence is first degree felony-murder, do not give this instruction." (Use Note to CALJIC No. 8.70 (6th ed.1996) p. 456.)

[13] The Legislature clearly was aware of many of these principles when it enacted section 1157 in 1872. In proposing the 1872 Penal Code to the Legislature, the California Code Commission explained in its note to section 189 that where a killing occurs during commission of one of the listed felonies, the question of degree "is answered by the statute itself, and the jury have [*sic*] no option but to find the prisoner guilty in the first degree. Hence, ... all difficulty as to the question of degree is removed by the statute." (Code commrs. note foll., Ann. Pen.Code, § 189 (1st ed. 1872, Haymond & Burch,

commrs.-annotators) p. 83.) Where, as here, "a statute proposed by the California Code Commission for inclusion in the Penal Code of 1872 [was] enacted by the Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature. [Citation.]" (*People v. Wiley* (1976) 18 Cal.3d 162, 171, 133 Cal.Rptr. 135, 554 P.2d 881 (*Wiley*).)

***910** In light of these principles, we conclude that where, as here, the trial court correctly instructs the jury only on first degree felony murder and to find the defendant either not guilty or guilty of first degree murder, section 1157 does not apply. Under these circumstances, as a matter of law, the *only* crime of which a ****443** defendant may be convicted is first degree murder, and the question of degree is not before the jury. As to the degree of the crime, there is simply no determination for the jury to make. Thus, a defendant convicted under these circumstances has not, under the plain and commonsense meaning of section 1157, been "convicted of a crime ... which is distinguished into degrees." [FN5]

> FN5. We are not establishing a rule that depends only on "the theory or theories argued by the prosecution" (dis. opn. of Mosk, J., *post,* 98 Cal.Rptr.2d at p. 457, 4 P.3d at p. 288) or "the evidence presented by the prosecution." (Dis. opn. of Kennard, J., *post,* at p. 464, 4 P.3d at p. 295.) Rather, we hold that section 1157 does not apply where the *jury instructions* actually and correctly given do not permit the jury to consider or return a murder conviction other than of the first degree. Moreover, the cases before us do not, as Justice Kennard suggests, involve an attempt "to discover what the jury actually but unspokenly decided as to the degree of the crime charged" (Dis. opn. of Kennard, J., *post,* at p. 461) or "to divine what degree of crime the jury found." (*Id.*, at p. 461, 4 P.3d at p. 292.) Rather, as explained, they involve a situation where, under proper instructions, the jury had no degree decision to make.

[14] ****276** A contrary construction would violate several principles of statutory interpretation. First, it would ignore the obvious purpose of the statute, which is to ensure that where a verdict *other than first degree is permissible,* the jury's determination of degree is clear. Applying section 1157 where jury instructions correctly permit only a first degree felony-murder conviction would do nothing to further this statutory purpose. [FN6]

> FN6. Nor would applying section 1157 under these circumstances further the statutory purposes the dissenters put forth. Where the trial court properly instructs the jury only on the elements of first degree murder and to convict only if it finds every one of those elements beyond a reasonable doubt, there is no "uncertainty" in the jury's verdict to "avoid." (Dis. opn. of Mosk, J., *post,* 98 Cal.Rptr.2d at p. 455, 4 P.3d at p. 287.) There also is no danger that a jury returning a conviction has not "found all the elements constituting the higher degree of the crime." (Dis. opn. of Kennard, J., *post,* at p. 459, 4 P.3d at p. 290; see also dis. opn. of Werdegar, J., *post,* at p. 465, 4 P.3d at p. 296.) Based on the evidence, the arguments, and its jury instructions, the trial court here promptly entered first degree murder judgments against defendants. Thus, applying section 1157 would not "promote ... administrative efficiency." (Dis. opn. of Mosk, J., *post,* at p. 455, 4 P.3d at p. 287.) All it would do under the circumstances here is produce second degree murder convictions even though the jury unquestionably found defendants guilty of first degree felony murder. Unlike Justice Mosk and Justice Kennard, we fail to see how this result would further a legislative intent to "promote justice " (dis. opn. of Mosk, J., *post,* at p. 455, 4 P.3d at p. 287) or "advance" justice. (Dis. opn. of Kennard, J., *post,* at p. 461, 4 P.3d at p. 292.) Justice Werdegar agrees that reducing Valle's conviction to second degree murder "is not a just result for this murderer." (Dis. opn. of Werdegar, J., *post,* at p. 465, 4 P.3d at p. 296.)

Second, a contrary construction would place section 1157 in conflict (rather than in harmony) with the applicable principles regarding jury instructions and permissible verdicts where the evidence points indisputably to a killing committed while perpetrating a felony that section 189 lists, and ***911** would "do violence to the principle that the law does not require idle acts. (Civ.Code, § 3532.)" (*Webber v. Webber* (1948) 33 Cal.2d 153, 164, 199 P.2d 934; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1240, 283 Cal.Rptr. 144, 812 P.2d 163 [refusing to interpret

statute to "require idle acts"].) As we have explained, such murders are of the first degree as a matter of law, and where the trial court properly instructs the jury to find a defendant either not guilty or guilty of first degree murder, there is simply no degree determination for the jury to make.

Finally, a contrary construction would produce absurd and unjust results. As we noted at the outset, where section 1157 applies, "[u]pon the failure" of the fact finder to determine degree, "the degree of the crime ... of which the defendant is guilty, shall be deemed to be of the lesser degree." The Legislature added this provision to section 1157 in 1949 to change the ***444** judicially declared rule that a failure to determine degree entitled a defendant to a new trial. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 73, 2 Cal.Rptr.2d 389, 820 P.2d 613 (*Marks II*); Stats.1949, ch. 800, § 1, p. 1537.) The result of applying it where, under correct instructions, a jury may convict a defendant *only* of first degree felony murder would be both absurd and unreasonable, for it would require courts to deem a conviction to be of a degree that was never at issue and that the jury was neither asked nor permitted to consider. For example, here, as defendant Valle concedes, it would "result[ ] in [his] being convicted of a lesser crime than the crime of which the evidence showed him to be guilty--in fact, a lesser crime than the crime of which his attorney at trial *conceded* he was guilty." This result would be "neither just nor fair" and would permit " 'form [to] triumph[ ] over substance.' " (*People v. Escobar* (1996) 48 Cal.App.4th 999, 1027, 55 Cal.Rptr.2d 883 (*Escobar*).) "[T]he law [would be] traduced." (*People v. Johns* (1983) 145 Cal.App.3d 281, 295, 193 Cal.Rptr. 182.) Because**277 "[w]e can think of no explanation why the Legislature could have desired" this absurd and unjust result, we reject a statutory construction that would produce it. (*People v. Broussard* (1993) 5 Cal.4th 1067, 1077, 22 Cal.Rptr.2d 278, 856 P.2d 1134 (*Broussard*) [construing Gov.Code, § 13967]; see also *People v. Dixon* (1979) 24 Cal.3d 43, 52, 154 Cal.Rptr. 236, 592 P.2d 752 [rejecting construction of § 1157 that would lead to "absurd results"]; *In re Haines* (1925) 195 Cal. 605, 613, 234 P. 883 ["[a]bsurd or unjust results will never be ascribed to the legislature"].) Thus, we conclude that when it amended section 1157 in 1951, the Legislature believed and intended that the statute would not apply where the only permissible conviction under proper jury instructions is first degree felony murder, because a defendant **912** convicted under these circumstances has not been "convicted of a crime ... which is distinguished into degrees." [FN7]

FN7. The principal basis for the statutory interpretation of Justice Mosk and Justice Kennard appears to be their view that it is neither absurd nor unjust to deem a murder conviction to be of the second degree despite proper jury instructions that permit only a first degree murder conviction and despite a defendant's concession that he committed first degree felony murder. (Dis. opn. of Mosk, J., *post*, 98 Cal.Rptr.2d at p. 455, 4 P.3d at p. 289; dis. opn. of Kennard, J., *post*, at p. 461, 4 P.3d at p. 292.) Otherwise, they could adopt our construction of section 1157 notwithstanding their belief that it is "contrary to" the statute's "plain language." (Dis. opn. of Mosk, J., *post*, at p. 457, 4 P.3d at p. 288; dis. opn. of Kennard, J., *post*, at p. 460, 4 P.3d at p. 291.) Writing for a unanimous court, Justice Mosk has stated that statutory language " ' "should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." ' [Citations.]" (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 113, 145 Cal.Rptr. 674, 577 P.2d 1014.) Also writing for the court, Justice Kennard has stated that "the plain meaning of a statute should not be followed when to do so would lead to 'absurd results.' [Citations.]" (*Broussard, supra*, 5 Cal.4th at p. 1072, 22 Cal.Rptr.2d 278, 856 P.2d 1134.) "In such circumstances, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citations.]" (*Id.* at pp. 1071-1072, 22 Cal.Rptr.2d 278, 856 P.2d 1134.) Although we disagree with their view of section 1157's "plain language" (dis. opn. of Mosk, J., *post*, at p. 457, 4 P.3d at p. 295; dis. opn. of Kennard, J., *post*, at pp. 459, 464, 4 P.3d at pp. 290, 295), our conclusion is nevertheless consistent with *Younger* and *Broussard*: it conforms the letter of the statutory language to the statute's spirit and avoids the absurd consequence of deeming a murder conviction to be of the second degree when, under correct instructions, it could only have been of the first degree. The dissenters' interpretation, on the other hand, would produce this absurd consequence without, as we have explained, furthering the purposes

they discuss.

In arguing for a contrary interpretation, defendants rely primarily on our decision in *People v. McDonald* (1984) 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709 (*McDonald*). There, the defendant stood trial on a murder charge, with a special circumstance allegation that he committed the murder while robbing or attempting to rob ***445** the victim. (*Id.* at p. 355, 208 Cal.Rptr. 236, 690 P.2d 709.) The jury returned a verdict finding the defendant " 'guilty of MURDER, in Violation of Section 187 Penal Code, a felony, as charged in Count I of the information.' " (*Id.* at p. 379, 208 Cal.Rptr. 236, 690 P.2d 709, italics omitted.) The jury also found the robbery special-circumstance allegation to be true. (*Id.* at p. 355, 208 Cal.Rptr. 236, 690 P.2d 709.) We reversed the conviction, holding that the trial court prejudicially erred in excluding expert testimony regarding psychological factors that may affect the accuracy of an eyewitness identification. (*Id.* at pp. 361-377, 208 Cal.Rptr. 236, 690 P.2d 709.)

We then turned to "address certain contentions dealing with the crimes for which defendant may be prosecuted on ... retrial." (*McDonald, supra,* 37 Cal.3d at p. 377, 208 Cal.Rptr. 236, 690 P.2d 709.) Among those contentions was the defendant's assertion that "the jury's failure to specify the degree of murder in its verdict render[ed] his conviction second degree murder by operation of law" under section 1157. (*McDonald, supra,* 37 Cal.3d at p. 379, 208 Cal.Rptr. 236, 690 P.2d 709.) We noted that this issue was "not likely to arise on retrial in this precise factual form," but discussed the issue because of possible double jeopardy implications, i.e., that retrial for a crime greater than second degree murder might be barred. (*Ibid.*)

***913** Responding to the defendant's contention under section 1157, the Attorney General argued in part that "because the jury was instructed solely on first degree murder, any ****278** verdict of guilt on the murder charge could only be in the first degree. The jury was instructed that before it could return a verdict of guilt on the murder charge, it must unanimously agree on whether defendant was guilty of murder of the first degree. Thus, ... the jury's verdict of guilty of murder 'as charged' constituted an implied finding of first degree murder." (*McDonald, supra,* 37 Cal.3d at p. 382, 208 Cal.Rptr. 236, 690 P.2d 709.)

We rejected this argument, finding "no reason why this variation in the facts should lead to a different result." (*McDonald, supra,* 37 Cal.3d at p. 382, 208 Cal.Rptr. 236, 690 P.2d 709.) Quoting *People v. Campbell* (1870) 40 Cal. 129, 1870 WL 882 (*Campbell*), we first opined that "the terms of the statute are unambiguous. No special exception is created for the situation presented by this case; had the Legislature chosen to make section 1157 inapplicable to cases in which the jury was instructed on only one degree of a crime, it could easily have so provided. The statute requires that 'if the jury shall find the defendant guilty, the verdict shall specify the degree of murder.... It establishes a rule to which there is to be no exception, and the Courts have no authority to create an exception when the statute makes none.' [Citation.]" (*McDonald, supra,* 37 Cal.3d at p. 382, 208 Cal.Rptr. 236, 690 P.2d 709.)

We then stated that "prior [judicial] applications of the statute suggest no rationale for excepting this case from the plain language of section 1157." (*McDonald, supra,* 37 Cal.3d at p. 382, 208 Cal.Rptr. 236, 690 P.2d 709.) Again turning to *Campbell,* we continued: "[T]his court in *Campbell* was faced with a dilemma similar to that which [the Attorney General] asserts exists in the present case. In *Campbell,* the People claimed that because the facts alleged in the indictment would support only a conviction of first degree and not of second degree murder, the failure of the jury to specify the degree did not require reversal. The court rejected this contention, stating that 'We have no right to disregard a positive requirement of the statute, as it is not our province to make laws, but to expound them.' (40 Cal. at p. 138.) In interpreting the statutory provision which then required that the jury 'designate' (rather than the equivalent current term 'find') the degree of the crime, the court stated: 'The word "designate," ***446** as here employed, does not imply that it will be sufficient for the jury to intimate or give some vague hint as to the degree of murder of which the defendant is found guilty; but it is equivalent to the words "express" or "declare," and it was evidently intended that the jury should expressly state the degree of murder in the verdict so that nothing should be left to implication on that point.... [T]he very letter of the statute ... requires the jury to "designate," or in other words, to express or declare by their verdict the degree of the crime. However absurd it may, at the first ***914** blush, appear to be to require the jury to designate the degree of the crime, when it appears on the face of the indictment that the offense charged has but one degree, there are plausible and, perhaps, very sound reasons for this requirement.... But whatever may have been the reasons for this enactment, it is sufficient for the Courts to know that the law is so written and it is

their duty to enforce it.' (*Id.* at pp. 139-140.)" (*McDonald, supra,* 37 Cal.3d at p. 383, 208 Cal.Rptr. 236, 690 P.2d 709.) Based on *Campbell, McDonald* stated that the Attorney General's "attempt to distinguish the present case on th[e] basis [of the jury instructions] must therefore fail, and it must be deemed as a matter of law that defendant was convicted of second degree murder. [Citation.]" (*McDonald, supra,* 37 Cal.3d at p. 383, 208 Cal.Rptr. 236, 690 P.2d 709, fn. omitted.)

On reexamination, we conclude that we should not follow *McDonald* 's discussion of section 1157 under the circumstances in the present cases, and we overrule *McDonald, supra,* 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, to the extent it is inconsistent with this opinion. We first observe that *McDonald* 's discussion of section 1157 was not necessary to that case's resolution. As we have previously noted, although reversing the defendant's conviction because the trial court erroneously excluded expert testimony, *McDonald* went on to discuss the section 1157 issue because of *possible* "double jeopardy ****279** considerations" on retrial. (*McDonald, supra,* 37 Cal.3d at p. 379, 208 Cal.Rptr. 236, 690 P.2d 709.) However, after stating that under section 1157, the murder conviction was deemed to be of the second degree, for three reasons we declined to consider whether double jeopardy principles barred retrial on first degree murder. "First, the question has not been raised by the parties, and its answer is not immediately obvious.... [¶] Second, the issue will not be presented on retrial unless the prosecution seeks a first degree murder conviction. But the prosecution's sole theory of first degree murder at trial was felony murder; given the jury's acquittal of defendant on the robbery charge and thus its implied acquittal on attempted robbery, the prosecution may be hard put to prove an underlying felony. If the prosecution limits itself to a maximum charge of second degree murder on retrial, the double jeopardy issue will manifestly not arise. Finally, as a general rule, the burden is on the defendant to enter a plea of double jeopardy at the appropriate time and to present a basis for the plea." (*McDonald, supra,* 37 Cal.3d at pp. 383-384, fn. 31, 208 Cal.Rptr. 236, 690 P.2d 709.) Given the reversal of the conviction on another ground, the parties' failure to raise the double jeopardy issue, and the likelihood the issue would not arise on retrial, it was not necessary in *McDonald* to discuss section 1157's application. (See *Marks II, supra,* 1 Cal.4th at p. 65, fn. 6, 2 Cal.Rptr.2d 389, 820 P.2d 613["[a]part from concluding the trial court committed reversible error, no other determination of law was 'necessary to the decision,' " including double jeopardy issue that "would become ripe only if and when the prosecution attempt[s] to reprosecute for the higher degree offense and the defendant raise[s] the bar of once in jeopardy"].)

[15][16][17] ***915** A decision "is not authority for everything said in the ... opinion but only 'for the points actually involved and actually decided.' [Citations.]" *****447**(*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620, 71 Cal.Rptr.2d 830, 951 P.2d 399.) "[O]nly the ratio decidendi of an appellate opinion has precedential effect [citation]...." (*Trope v. Katz* (1995) 11 Cal.4th 274, 287, 45 Cal.Rptr.2d 241, 902 P.2d 259.) Thus, "we must view with caution seemingly categorical directives not essential to earlier decisions and be guided by this dictum only to the extent it remains analytically persuasive." (*Marks II, supra,* 1 Cal.4th at p. 66, 2 Cal.Rptr.2d 389, 820 P.2d 613.)

For several reasons, we do not find *McDonald* 's dictum analytically persuasive. Principally, in relying heavily on *Campbell* and quoting from it extensively, *McDonald* failed to consider that *Campbell* did not construe section 1157, but construed a *different* statute with *different* language. *Campbell* construed section 1157's predecessor, section 21 of the Act Concerning Crimes and Punishments (Act section 21). (*Campbell, supra,* 40 Cal. at pp. 137-138.) After defining murder in the first and second degrees, that section provided in relevant part: "[T]he jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree." (Stats.1856, ch. 139, § 2, p. 219.) As is readily apparent, Act section 21 did not contain the qualifying language of section 1157 we are now construing: "Whenever a defendant is convicted of a crime ... which is distinguished into degrees." Rather, *without qualification,* Act section 21 imposed a duty to make a degree finding on *every* jury hearing a case in which "any person" was "indicted for murder." (Stats.1856, ch. 139, § 2, p. 219.) Thus, *Campbell* "cannot be regarded as authority for proper construction of the quite different code section enacted in 1872." (*People v. Valentine* (1946) 28 Cal.2d 121, 144, 169 P.2d 1 (*Valentine*) [construing § 192].) Yet, in basing its discussion of section 1157 exclusively on *Campbell, McDonald* failed to consider, or even acknowledge, the difference in language between section 1157 and Act section 21. It also failed actually to examine section 1157's language or consider its plain and commonsense

meaning.

[18][19][20] Indeed, the relevant legislative history suggests that the replacement of Act section 21 with section 1157 was a direct legislative response to *Campbell* 's reading of the prior statute. The Legislature enacted section 1157 in 1872, only two years after we ****280** decided *Campbell.* In doing so, it deleted the very language-- "before whom any person indicted for murder shall be tried"--on which *Campbell* focused in concluding that Act section 21 required *all* juries, without exception, to designate the degree of a murder conviction. (See *Campbell, supra,* 40 Cal. at p. 138.) When it made this change, the Legislature clearly knew of *Campbell;* in proposing section 1157 ***916** to the Legislature, the California Code Commission included an explanatory note expressly referencing *Campbell.* (Code commrs., note foll., Ann. Pen.Code, § 1157, *supra,* at pp. 404-405; see also *Wiley, supra,* 18 Cal.3d 162 at p. 171, 133 Cal.Rptr. 135, 554 P.2d 881.) As a general rule, in construing statutes, "[w]e presume the Legislature intends to change the meaning of a law when it alters the statutory language [citation], as for example when it deletes express provisions of the prior version [citation]." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 461, 279 Cal.Rptr. 834, 807 P.2d 1063.) In *Valentine,* we applied this rule in the context of construing section 192, another section of the 1872 Penal Code, holding that "the repeal of" a prior statute, "together with enactment of a new law on the same subject with [an] important limitation deleted, strongly suggests that the Legislature intended" to change the law. (*Valentine, supra,* 28 Cal.2d at p. 143, 169 P.2d 1.) Similarly, the Legislature's repeal of Act section 21, together with its enactment of a new statute on the same subject--section 1157--with significant differences in language, strongly suggests the Legislature intended to change the law. Indeed, here, because the Legislature knew of *Campbell* ' s statutory construction, and the omitted *****448** word or phrase "was significant to" that construction, the inference of altered intent "is particularly compelling." (*Dix, supra,* 53 Cal.3d at p. 462, 279 Cal.Rptr. 834, 807 P.2d 1063 [construing § 1170, subd. (d)]; see also *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659-661, 147 Cal.Rptr. 359, 580 P.2d 1155; *Oakland Pav. Co. v. Whittell Realty Co.* (1921) 185 Cal. 113, 120, 195 P. 1058 [deletion of language on which court based its statutory interpretation "is a clear indication of the legislative purpose" to change the law].) Thus, it appears that in substantially revising the relevant language when it enacted section 1157, the Legislature was responding to *Campbell* and intended to change the law. *McDonald,* which followed *Campbell* without recognizing the difference in the language of section 1157 and Act section 21, did not even consider this possibility. [FN8]

> FN8. We disagree with Justice Mosk's suggestion that as to section 1157, the legislative history of the 1872 statute "evinces the intent of the Commission for Revision of the Laws to 'preserv[e]' the 'spirit and substance' of existing law." (Dis. opn. of Mosk, J., *post,* 98 Cal.Rptr.2d at p. 456, 4 P.3d at p. 287.) In making this assertion, Justice Mosk partially quotes the preface to the 1872 Penal Code. However, as Justice Mosk elsewhere acknowledges (dis. opn. of Mosk, J., *post,* at pp. 455-456, fn. 1, 4 P.3d at p. 287, fn. 1), the partially quoted sentence actually states in full: " 'While *many* sections of existing laws have been redrawn *to correct verbal errors* and *to give them precision and clearness,* their spirit and substance have, in all cases, been preserved.' " (Code commrs., Preface, Ann. Pen.Code, *supra,* at p. vi., italics added.) By its terms, this sentence does not describe the fate under the new code of *all* existing sections, only of " 'many.' " (*Ibid.*) Indeed, only two sentences later, the Preface also states: " 'Many new sections have been introduced, but these were necessary to "supply the defects of and give completeness to the existing legislation of the State." ' " (*Ibid.*) The significant linguistic differences between section 1157 and Act section 21 indicate that section 1157 falls within this latter category of " 'new sections' " that " ' "supply the defects of and give completeness to the existing legislation of the State" ' "; section 1157 did not merely " 'correct verbal errors' " in or give " 'precision and clearness' " to Act section 21. (Code commrs., Preface, Ann. Pen.Code, *supra,* at p. vi.)

Moreover, because *McDonald* failed to acknowledge or consider the significant difference in statutory language, it also failed to recognize that ***917** the focus of *Campbell* 's analysis is not relevant to section 1157's construction. As noted, the jury's duty under Act section 21 to designate the degree of a murder conviction extended to "any person *indicted for* murder." (Stats. 1856, ch. 139, § 2, p. 219, italics

added.) Accordingly, the Attorney General's argument and our statutory analysis in *Campbell* focused *exclusively* on the indictment. (*Campbell, supra,* 40 Cal. at pp. 137-141.) Given the language of Act section 21, we had no reason to consider, and our discussion did not mention, whether the ****281** trial court instructed the jury that the defendant could be convicted only of first degree felony murder. By contrast, such an instruction is very much relevant in determining whether a defendant has been "convicted of a crime ... which is distinguished into degrees" within the meaning of section 1157. In simply following *Campbell, McDonald* did not consider this distinction.

Nor did *McDonald* consider that the consequence under Act section 21 of a jury's failure to designate the crime's degree was significantly different from the consequence under section 1157. In *Campbell,* the jury's failure in this regard entitled the defendant to reversal of the judgment and a new trial. (*Campbell, supra,* 40 Cal. at p. 141.) By contrast, section 1157 specifies that upon a jury's failure to make the required determination, the crime's degree "shall be deemed to be of the lesser degree." As we have already explained, where, as here, the only legally permissible conviction under the jury instructions is first degree felony murder, application of this provision produces absurd and unjust results. By failing to consider this point, *McDonald* failed to *****449** recognize that the context in which Act section 21 operated was significantly different from that in which section 1157 operates. As we have also already explained, context is important in construing statutory language. [FN9]

> FN9. None of the authorities Justice Kennard cites support her assertion that we "must" interpret section 1157 as *Campbell* interpreted Act section 21. (Dis. opn. of Kennard, J., *post,* 98 Cal.Rptr.2d at p. 463, 4 P.3d at p. 294.) Section 5 states: "The provisions of this Code, *so far as they are substantially the same as existing statutes,* must be construed as continuations thereof, and not as new enactments." (Italics added.) It is inapplicable because, as we have explained, section 1157's language is not substantially the same as that of Act section 21. *People v. Ellis* (1928) 204 Cal. 39, 44, 266 P. 518 (*Ellis*) is inapplicable for the same reason; it expressly invoked the rule of statutory construction that applies where provisions are readopted " 'without change.' " (Cf. *People v. St. Martin* (1970) 1 Cal.3d 524, 535, 83 Cal.Rptr. 166, 463 P.2d 390 [refusing to apply "reenactment rule" where reenacted statute did not " 'use[ ] the same language' " as the prior one].) *Ellis* did not, as Justice Kennard suggests, "conclud[e]" that the 1872 Penal Code statute there at issue contained "significant changes in wording." (Dis. opn. of Kennard, J., *post,* at p. 463, 4 P.3d at p. 294.) *People v. Travers* (1887) 73 Cal. 580, 581, 15 P. 293 does not cite section 5 and states only that the construction of Act section 21 "may guide" section 1157's construction. Moreover, its discussion of *Campbell* was limited to a single descriptive sentence, which simply noted that *Campbell* "reversed [a] judgment because the verdict did not designate the degree of the crime." (*Travers, supra,* 73 Cal. at p. 582, 15 P. 293.) Also, *Travers* construed section 1157 before legislative amendments made it applicable only where the defendant is "convicted of a crime ... which is distinguished into degrees" and specified the consequence of a jury's failure to make a degree finding. Finally, *Travers* did not consider the question now before us.

***918** *McDonald* 's failure to consider these matters is not surprising, given the Attorney General's contentions in that case. The Attorney General in *McDonald* did not argue that because the jury instructions permitted a conviction only of first degree murder, the defendant was not "convicted of a crime ... which is distinguished into degrees" within the meaning of section 1157, the statute was inapplicable, and a degree determination was unnecessary. Rather, the Attorney General argued that in light of the jury instructions, "the jury's verdict of guilty of murder 'as charged' constituted an implied finding of first degree murder." (*McDonald, supra,* 37 Cal.3d at p. 382, 208 Cal.Rptr. 236, 690 P.2d 709.) Thus, the Attorney General in *McDonald* conceded the statute's applicability, but argued that its requirements had been satisfied under the circumstances.

Notably, in *People v. Bonillas* (1989) 48 Cal.3d 757, 257 Cal.Rptr. 895, 771 P.2d 844 (*Bonillas*), we cited similar considerations in refusing to deem *McDonald* binding on another question of section 1157's construction. *Bonillas* held that a jury made a sufficient degree finding under section 1157 where it initially returned a verdict silent as to degree but the next court day returned a supplemental verdict finding the defendant guilty of first degree murder.

(*Bonillas, supra,* 48 Cal.3d at pp. 768-770, 257 Cal.Rptr. 895, 771 P.2d 844.) As authority for a contrary conclusion, the defendant in *Bonillas* cited *McDonald,* which refused to give effect to an express degree finding in a supplemental verdict the jury made more than three weeks after returning the original verdict. ****282**(*McDonald, supra,* 37 Cal.3d at pp. 379-382, 208 Cal.Rptr. 236, 690 P.2d 709.) In *Bonillas,* we did not follow *McDonald* 's analysis on this issue, explaining: "[T]he argument of the People in *McDonald* was not that the jury's completing its verdict was proper but that a jury 'finding' of first degree murder could be inferred.... [¶] Not only did the People in *McDonald* not argue that the court's attempt to have the jury complete its verdict was proper, it appears in *McDonald* the People conceded it was not. [Citation.] Thus, the propriety of the attempt to complete the verdict was not placed in issue in *McDonald.* It is true that in the portion of the opinion discussing *People v. Hughes* [(1959) 171 Cal.App.2d 362, 340 P.2d 679], there is ***450** some language in *McDonald* that appears to bear on the question, but that language failed to give recognition to the critical distinction between the situation in *McDonald* and the circumstances in *Hughes.* ..." (*Bonillas, supra,* 48 Cal.3d at pp. 775-776, 257 Cal.Rptr. 895, 771 P.2d 844.)

Similarly, as we have already explained, the Attorney General in *McDonald* did not argue that in light of the jury instructions, section 1157 was ***919** inapplicable because the defendant was not "convicted of a crime ... which is distinguished into degrees" within the meaning of section 1157. As we have also explained, *McDonald* 's discussion failed to recognize the "critical distinction" (*Bonillas, supra,* 48 Cal.3d at p. 776, 257 Cal.Rptr. 895, 771 P.2d 844) between the language of Act section 21 and section 1157. Thus, the analytical considerations we cited in *Bonillas* in finding *McDonald* 's discussion of section 1157 "not controlling" (*Bonillas, supra,* 48 Cal.3d at p. 775, 257 Cal.Rptr. 895, 771 P.2d 844) apply equally to *McDonald* 's discussion of the section 1157 issue now before us. *McDonald* 's failure to consider the matters we have discussed in following *Campbell* 's application of Act section 21 significantly undermines its discussion of section 1157. (See *Oakland Pav. Co. v. Whittell Realty Co., supra,* 185 Cal. at p. 119, 195 P. 1058 [refusing to follow opinions that "simply followed decisions rendered under previous statutes" without considering changes in statutory language].)

[21] We reject defendants' argument that we may not reconsider *McDonald* because the Legislature has acquiesced in that decision. " 'We are not here faced with a situation in which the Legislature has adopted an established judicial interpretation by repeated *reenactment* of a statute.' (Italics added.) [Citations.] The Legislature has neither reenacted nor amended nor rewritten any portion of [section 1157] since [we decided *McDonald*]. The lawmakers, in short, have simply not spoken on the subject during the intervening years." (*People v. Daniels* (1969) 71 Cal.2d 1119, 1128, 80 Cal.Rptr. 897, 459 P.2d 225 (*Daniels*).) "Thus, although the Legislature has not affirmatively disapproved [our] analysis in [*McDonald*], neither has it expressly or impliedly endorsed it. Accordingly, ... we are free to reexamine our earlier [decision]. [Citations.]" (*People v. Escobar* (1992) 3 Cal.4th 740, 751, 12 Cal.Rptr.2d 586, 837 P.2d 1100.) Indeed, as Justice Mosk wrote for the court in *Daniels,* "while the Legislature may thus choose to remain silent, we may not. It continues to be our duty to decide each case that comes before us; in so doing, we must apply every statute in the case according to our best understanding of the legislative intent; and in the absence of further guidance by the Legislature, we should not hesitate to reconsider our prior construction of that intent whenever such a course is dictated by the teachings of time and experience.... Respect for the role of the judiciary in our tripartite system of government demands no less." (*Daniels, supra,* 71 Cal.2d at p. 1128, 80 Cal.Rptr. 897, 459 P.2d 225.)

[22] In arguing to the contrary, defendants cite the Legislature's consideration, and rejection, of proposed amendments to section 1157. As introduced in March 1990, Senate Bill No. 2572 (1989-1990 Reg. Sess.) would have amended section 1157 to provide that when a jury fails to determine the crime's degree, instead of deeming the crime to be of the lesser degree, "the trial court or an appellate court may fix the degree ... if it is able to ***920** determine from other jury findings in the same case the degree the jury intended to fix. If this determination cannot be made, [on timely motion] the defendant ****283** shall be entitled ... to a hearing before a new jury to determine the degree...." (Sen. Bill No. 2572 (1989-1990 Reg. Sess.) § 1.) The Legislature later dropped the proposed amendment to section 1157 and ultimately passed a bill that amended section 1164 to specify "the degree of the crime" as one of the issues the trial court, before discharging the jury, must verify on the record the ****451** jury has determined. (Stats.1990, ch. 800, § 1, p. 3548.)

[23] In 1998 the Legislature again considered amending section 1157. As introduced, Assembly Bill No. 2402 (1997-1998 Reg. Sess.) would have made section 1157 "inapplicable whenever the crime [of which the defendant is convicted] is of the higher degree as a matter of law." (Assem. Bill No. 2402 (1997-1998 Reg. Sess.) § 1.) It also would have added two new subdivisions to section 1157, providing: (1) "The failure to make [a degree] finding shall not prevent the degree from being determined by admitted evidence, the charging instrument, jury instructions given, or other jury findings that were made. In the event the jury fails ... to record the degree ..., the court may, in its discretion, set the degree at the higher level where there is clear and reliable evidence to support such a determination. The court shall set forth on the record the facts and reasons for setting the degree at the higher level"; and (2) "If the degree cannot be determined, then the court, in its discretion, may either set the degree at the lower level or order a new trial, the sole issue of which shall be the determination of the degree." (Assem. Bill No. 2402 (1997-1998 Reg. Sess.) § 1.) An amended version of the bill provided: (1) section 1157 "shall only apply to the situation where the finder of fact has a choice as to the degree"; and (2) "If the crime ... for which the defendant was convicted is a specified degree as a matter of law, upon the failure of the jury to determine the degree ..., the court may fix the degree as specified. In determining whether the degree of the offense is a specified degree as a matter of law, the court may refer to the descriptive substantive definitions contained in the charging document, any factual finding contained in the verdict form, the fact that the jury was only instructed on a specified degree and not any lesser degree, or the fact that the jury was only instructed on one theory of the case." (Assem. Amend. to Assem. Bill No. 2402 (1997-1998 Reg. Sess.) Apr. 29, 1998.) After another amendment in the Assembly, the bill was sent to the Senate, where it failed in committee. [FN10]

> FN10. Defendants ask that we take judicial notice of legislative materials relating to Senate Bill No. 2572 (1989-1990 Reg. Sess.), and the Attorney General asks that we take judicial notice of similar materials relating to Assembly Bill No. 2402 (1997-1998 Reg. Sess.). We grant these unopposed requests.

[24][25][26] We do not agree with defendants that these failed attempts to amend section 1157 require us to follow *McDonald* 's discussion of ***921**section 1157. As Justice Mosk has written in a majority opinion for this court, " '[u]npassed bills, as evidences of legislative intent, have little value.' [Citations.]" (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 746, 38 Cal.Rptr.2d 650, 889 P.2d 970 (*Granberry*).) Contrary to defendants' assertion, the Legislature's failure to enact the amendments proposed in 1990 and 1998 "demonstrates nothing about what the Legislature intended" when it previously enacted section 1157 with the language we are now construing. (*Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 230, 216 Cal.Rptr. 688, 703 P.2d 27.) "At most it might arguably reflect" the Legislature's intent in 1990 and 1998. (*Ibid.*) But it provides very limited, if any, guidance even as to that intent, because the Legislature's failure to enact a proposed statutory amendment may indicate many things other than approval of a statute's judicial construction, including the pressure of other business, political considerations, or a tendency to trust the courts to correct its own errors. [FN11] ****284** *****452**(*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 506, 87 Cal.Rptr.2d 702, 981 P.2d 543 (*Sierra Club*); *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735, fn. 7, 180 Cal.Rptr. 496, 640 P.2d 115.) "We can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law." [FN12] ***922**(*Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1349, 241 Cal.Rptr. 42, 743 P.2d 1299, fn. omitted.)

> FN11. Regarding the 1998 legislation, the Attorney General cites a Senate committee report that (1) described the proposed amendment as "essentially codif[ying]" the Court of Appeal opinion in this case, (2) reported the view of the California Attorneys for Criminal Justice that the amendment was "unnecessary since the issue of what to do when the jury does not indicate degree is currently in front of the Supreme Court with the *Mendoza* case," and (3) concluded by asking whether the issue "is better resolved by the Supreme Court." (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 2402 (1997-1998 Reg. Sess.) June 30, 1998, pp. 5-6.) The Attorney General finds it "clear" from this report and the proposal's failure in the Senate committee that "the [L]egislature is looking to this Court to correct its error" in *McDonald*. Although we do not adopt the Attorney General's conclusion, we agree that

it is at least plausible.

FN12. The reliance of Justices Mosk and Kennard on these failed attempts to amend section 1157 (dis. opn. of Mosk, J., *post,* 98 Cal.Rptr.2d at pp. 456-457, 4 P.3d at pp. 287-288; dis. opn. of Kennard, J., *post,* at pp. 461-462, 4 P.3d at pp. 292-293) is inconsistent with the decisions we have cited, including Justice Mosk's majority opinion in *Granberry.* The cases Justice Mosk cites do not hold to the contrary. *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 795, 38 Cal.Rptr.2d 699, 889 P.2d 1019, affirms that "only limited inferences can be drawn from" unpassed bills. Neither *People v. Ledesma* (1997) 16 Cal.4th 90, 65 Cal.Rptr.2d 610, 939 P.2d 1310, nor *People v. Bouzas* (1991) 53 Cal.3d 467, 279 Cal.Rptr. 847, 807 P.2d 1076, involved reliance on unpassed legislation. Rather, in both, we invoked the rule of statutory construction that applies where the Legislature reenacts a statute without changing its judicial construction. (*People v. Ledesma, supra,* 16 Cal.4th at pp. 100-101, 65 Cal.Rptr.2d 610, 939 P.2d 1310; *People v. Bouzas, supra,* 53 Cal.3d at p. 474, 279 Cal.Rptr. 847, 807 P.2d 1076.) As we have explained, citing Justice Mosk's majority opinion in *Daniels,* that rule does not apply here because the Legislature has not reenacted or amended section 1157 since we decided *McDonald.* For this reason, we disagree with Justice Werdegar's view that we must adhere to *McDonald* 's "illogic[al]" interpretation because the Legislature "has acquiesced to" it. (Dis. opn. of Werdegar, J., *post,* 98 Cal.Rptr.2d at p. 465, 4 P.3d at p. 296.)

That the Legislature in 1990 ultimately amended section 1164 rather than section 1157 does not require a different conclusion. Legislation adopting *McDonald,* either expressly or impliedly, would logically be placed in section 1157, the specific section at issue, not in section 1164. (Cf. *People v. King* (1993) 5 Cal.4th 59, 76, 19 Cal.Rptr.2d 233, 851 P.2d 27 (*King*) [construing § 12022.5].) Section 1164 contains no reference to *McDonald* 's discussion or even section 1157. Any connection between what is now section 1164 and *McDonald* is too oblique to signal an intent to codify *McDonald* 's discussion. (Cf. *King, supra,* 5 Cal.4th at p. 76, 19 Cal.Rptr.2d 233, 851 P.2d 27.)

[27] Nor does our treatment of *McDonald* in subsequent decisions require that we follow its discussion of section 1157 under the circumstances now before us. Recently, in finding *McDonald* 's discussion of section 1157 irrelevant to construction of another Penal Code section, we stated: "In distinguishing [this] decision[ ], we do not comment upon [its] reasoning or conclusions." (*People v. Paul* (1998) 18 Cal.4th 698, 710, fn. 10, 76 Cal.Rptr.2d 660, 958 P.2d 412.) And, as previously discussed, citing analytical considerations similar to those that exist here, we refused in *Bonillas* to follow *McDonald* 's analysis regarding the adequacy under section 1157 of degree findings in supplemental verdicts. (*Bonillas, supra,* 48 Cal.3d at pp. 774-776, 257 Cal.Rptr. 895, 771 P.2d 844.) Moreover, in *Bonillas,* supplemental verdict forms gave the jury the option of finding *either* first or second degree murder. (*Id.* at p. 768, 257 Cal.Rptr. 895, 771 P.2d 844.) Thus, unlike the present cases, *Bonillas* did not involve section 1157's application where the jury's *only* conviction option on a murder charge is first degree murder. As we have often said, we must construe the language of an opinion with reference to the facts the case presents, " 'and the positive authority of a decision is coextensive only with such facts.' [Citations.]" ***453** [FN13] **285(*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735, 257 Cal.Rptr. 708, 771 P.2d 406.)

FN13. In *People v. Cain* (1995) 10 Cal.4th 1, 53-57, 40 Cal.Rptr.2d 481, 892 P.2d 1224, under circumstances that appear to be similar to those now before us, we followed *Bonillas, supra,* 48 Cal.3d 757, 257 Cal.Rptr. 895, 771 P.2d 844, in finding that the trial court had properly reconvened the jury to make a degree finding. In doing so, we neither cited *McDonald, supra,* 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, nor considered the threshold question of whether section 1157 applies where the court instructs the jury only on first degree felony murder.

Defendant Valle asserts that we "unanimously reaffirmed" *McDonald* in *Marks II* and in our earlier decision in the same case, *People v. Marks* (1988) 45 Cal.3d 1335, 248 Cal.Rptr. 874, 756 P.2d 260 (*Marks I*). Valle is correct ***923** that those decisions cited *McDonald* in stating that despite the jury's true finding on a special circumstance allegation, under section 1157 defendant's conviction was for second degree murder because the jury failed to make a

degree finding. (*Marks II, supra,* 1 Cal.4th at p. 73, 2 Cal.Rptr.2d 389, 820 P.2d 613; *Marks I, supra,* 45 Cal.3d at p. 1344, 248 Cal.Rptr. 874, 756 P.2d 260.) However, neither *Marks I* nor *Marks II* states whether, as in the present cases, the trial court instructed the jury *only* on first degree murder. Nor did either decision reconsider or add to *McDonald* 's section 1157 analysis as it relates to the issue we are now considering. Indeed, in *Marks II* we explained that *Marks I* 's brief discussion of section 1157 was not " 'necessary to the decision,' " given our determination there that the trial court "committed reversible error" in another respect. (*Marks II, supra,* 1 Cal.4th at p. 65, fn. 6, 2 Cal.Rptr.2d 389, 820 P.2d 613.) We also explained that our "principal[ ] concern[ ]" in *Marks II* was not the meaning of section 1157's first sentence, which contains the language we are now construing, but was "the operation and effect of [section 1157's] second sentence by which a crime is deemed of the lesser degree." (*Marks II, supra,* 1 Cal.4th at p. 71, fn. 12, 2 Cal.Rptr.2d 389, 820 P.2d 613.) Thus, *Marks I* and *Marks II* provide an insufficient basis for following *McDonald* 's discussion in the cases now before us.

We are also mindful that our Courts of Appeal have been critical of *McDonald* and have adhered to it only grudgingly. In *Escobar, supra,* 48 Cal.App.4th at page 1027, 55 Cal.Rptr.2d 883, the court described the result *McDonald* requires as "neither just nor fair" and a " 'triumph[ ]' " of " 'form ... over substance.' " Nevertheless, the court applied section 1157 on facts analogous to those before us "under the compulsion of" *McDonald.* (*Escobar, supra,* 48 Cal.App.4th at p. 1026, 55 Cal.Rptr.2d 883.) In *People v. Dailey* (1996) 47 Cal.App.4th 747, 749, 55 Cal.Rptr.2d 171, another felony-murder case, the court reluctantly followed *McDonald,* concluding that it was "powerless" to do otherwise even though applying section 1157 might "reduce by decades" the sentences imposed. The court also discussed a number of "troublesome aspects" of this result. (*People v. Dailey, supra,* 47 Cal.App.4th at p. 754, 55 Cal.Rptr.2d 171.) In *In re Birdwell* (1996) 50 Cal.App.4th 926, 929, 58 Cal.Rptr.2d 244, the court noted that the *McDonald* rule has been "criticized for its inflexibility." And in *Bonillas,* Justice Arguelles wrote a concurring opinion, in which Justices Eagleson and Kaufman joined, that described "the reluctance expressed by the justices of our intermediate appellate courts" to apply *McDonald,* including one who "urg[ed] that *McDonald* ... be overruled. [Citation.]" (*Bonillas, supra,* 48 Cal.3d at p. 803, fn. 3, 257 Cal.Rptr. 895, 771 P.2d 844 (conc. opn. of Arguelles, J.).) The concerns and comments of the Courts of Appeal that have reluctantly followed *McDonald* "should not be ignored." (*Landrum v. Superior Court* (1981) 30 Cal.3d 1, 12, 177 Cal.Rptr. 325, 634 P.2d 352; see also *King, supra,* 5 Cal.4th at pp. 63, 72-75, 77, 19 Cal.Rptr.2d 233, 851 P.2d 27 [considering criticism by ***454** Courts of Appeal in reexamining and overruling precedent].) Indeed, even we have observed that under ***924** *McDonald,* "on occasion 'form triumphs over substance, and the law is traduced' [citation]...." (*Marks II, supra,* 1 Cal.4th at p. 74, 2 Cal.Rptr.2d 389, 820 P.2d 613.)

[28][29][30][31] We also conclude that the principle of stare decisis does not prevent us in these cases from reexamining *McDonald* 's discussion of section 1157. Because of the need for certainty, predictability, and stability in the law, we do not lightly overturn our prior opinions. (*Sierra Club, supra,* 21 Cal.4th at pp. 503-504, 87 Cal.Rptr.2d 702, 981 P.2d 543.) However, this policy does not " 'shield court-created error from correction,' " but "is a flexible one" that permits us "to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case." (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) ***286**46 Cal.3d 287, 296, 250 Cal.Rptr. 116, 758 P.2d 58; see also *King, supra,* 5 Cal.4th at p. 78, 19 Cal.Rptr.2d 233, 851 P.2d 27.) A key consideration in determining the role of stare decisis is whether the decision being reconsidered has become a basic part of a complex and comprehensive statutory scheme, or is simply a specific, narrow ruling that may be overruled without affecting such a statutory scheme. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1214-1216, 23 Cal.Rptr.2d 144, 858 P.2d 611.) *McDonald* "sets forth a narrow rule of limited applicability" and has not become a basic part of any comprehensive statutory scheme. (*Sierra Club, supra,* 21 Cal.4th at p. 505, 87 Cal.Rptr.2d 702, 981 P.2d 543.) Thus, "concerns other than stare decisis"--which we have discussed above--"predominate[ ]"; stare decisis does not mandate our continued adherence to *McDonald.* [FN14] (*People v. Latimer, supra,* 5 Cal.4th at p. 1216, 23 Cal.Rptr.2d 144, 858 P.2d 611; see also *Landrum, supra,* 30 Cal.3d at p. 14, 177 Cal.Rptr. 325, 634 P.2d 352 [we should overrule prior decision rather than "sacrifice legislative policies or create absurd procedures"].)

FN14. Justice Mosk suggests that our conclusion is contrary to the manner in which we have "consistently" construed section 1157. (Dis. opn. of Mosk, J., *post,*

98 Cal.Rptr.2d at p. 455, 4 P.3d at p. 287.) Justice Kennard asserts that we "disregard[ ]" this court's "consistent" interpretation of section 1157 "as requiring the jury to determine the degree regardless of the evidence or the instructions it receives." (Dis. opn. of Kennard, J., *post,* at p. 458, 4 P.3d at p. 289.) And Justice Werdegar insists that we must adhere to "this court's long-standing interpretation of section 1157." (Dis. opn. of Werdegar, J., *post,* at p. 465, 4 P.3d at p. 296.) However, neither Justice Mosk nor Justice Kennard cites a case that discusses the issue here other than *McDonald,* a relatively recent (1984) decision. Although, after consideration, we have found *McDonald* 's dictum unpersuasive, we have not simply disregarded it. *People v. Beamon* (1973) 8 Cal.3d 625, 105 Cal.Rptr. 681, 504 P.2d 905 (*Beamon*), which Justice Werdegar cites in addition to *McDonald* (dis. opn. of Werdegar, J., *post,* at p. 466, 4 P.3d at p. 297), is not on point; nothing in it indicates that the trial court in that case instructed the jury on only one degree of the charged crime (robbery). On the contrary, by noting that the jury "failed to apply" a factual finding "to fix the degree" of the crime and "refrained from expressly fixing the degree," the *Beamon* opinion suggests that the trial court's instructions did, in fact, direct the jury to fix the crime's degree. (*Beamon, supra,* 8 Cal.3d at p. 629, fn. 2, 105 Cal.Rptr. 681, 504 P.2d 905.)

[32][33] Finally, "as is customary for judicial case law," we conclude that our holding may be applied to defendants Mendoza and Valle "and is otherwise fully retroactive." ***925**(*People v. Birks* (1998) 19 Cal.4th 108, 136, 77 Cal.Rptr.2d 848, 960 P.2d 1073.) Due process principles do not require a different conclusion, because our holding "neither expands criminal liability nor enhances punishment for conduct previously committed. [Citations.] ... [¶] No other inequity arises from retroactive application of [our] decision." (*Ibid.*) When they committed their crimes, defendants "acquired no cognizable reliance interest" in obtaining a verdict of second degree murder "by the means set forth in" *McDonald.* ***455**(*Birks, supra,* 19 Cal.4th at pp. 136-137, 77 Cal.Rptr.2d 848, 960 P.2d 1073.) Defendants do not, and cannot, claim that their cases "would have been conducted differently absent" *McDonald.* (*Birks, supra,* 19 Cal.4th at p. 137, 77 Cal.Rptr.2d 848, 960 P.2d 1073.) We therefore hold that the trial court properly entered judgments against defendants for first degree murder.

Given our conclusion that section 1157 does not apply in the present cases, we need not consider the Attorney General's alternative contention that article VI, section 13 of the California Constitution precludes us from setting aside defendants' convictions for first degree murder because any error in failure to comply with section 1157 did not "result[ ] in a miscarriage of justice."

CONCLUSION

The judgment of the Court of Appeal is affirmed.

GEORGE, C.J., BAXTER and BROWN, JJ., concur.

Dissenting Opinion By MOSK, J.

I dissent.

Penal Code section 1157 in pertinent part requires: "Whenever a defendant is convicted of a crime ... which is distinguished into degrees, the jury, or the court if a jury trial ****287** is waived, must find the degree of the crime ... of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime ... of which the defendant is guilty, shall be deemed to be of the lesser degree."

We have consistently, until today, taken the Legislature at its word, strictly construing Penal Code section 1157 to require an express indication by the trier of fact of the degree of the offense. (*People v. McDonald* (1984) 37 Cal.3d 351, 382, 208 Cal.Rptr. 236, 690 P.2d 709.) We have specifically rejected the argument, renewed herein, that when a jury is instructed solely on first degree murder, the failure of the jury to designate the degree does not trigger the default provision of the statute. Thus, in *People v. McDonald,* which I authored, we explained: "[T]he statute applies to reduce the degree even in situations in which the jury's intent to convict ***926** of the greater degree is demonstrated by its other actions.... [T]he key is not whether the 'true intent' of the jury can be gleaned from circumstances outside the verdict form itself; instead, application of the statute turns only on whether the jury specified the degree in the verdict form.... [¶] ... [¶] ... No special exception is created for the situation presented by this case [in which the jury was instructed solely on first degree murder]." (*Ibid.*)

Contrary to the majority's assertions, there is nothing "unjust"--let alone "absurd" (maj. opn., *ante,* 98 Cal.Rptr.2d at p. 443, 4 P.3d at p. 276)-- about this simple bright-line rule as applied to a case involving a charge of felony murder. The clear legislative aim of the statute and its predecessor, section 21 of the amended Act Concerning Crimes and Punishments, dating back more than a century, is to avoid uncertainty with regard to the jury's actual verdict and to promote justice and administrative efficiency by requiring a verdict that is clear on its face. [FN1]

> FN1. Section 21 of the Act Concerning Crimes and Punishments, as amended, provided: "[T]he jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree." (Stats.1856, ch. 139, § 2, p. 219.) In *People v. Campbell* (1870) 40 Cal. 129, 139, we held the statute to require that "the jury should expressly state the degree of murder in the verdict so that nothing should be left to implication on that point." Penal Code section 1157, first enacted in 1872, *continued the same requirement,* while broadening it to apply not only to murder, but to any crime divisible into degrees. Indeed, the preface to the 1872 Penal Code indicates the drafters' intent to retain the substance of existing law: "While many sections of existing laws have been redrawn to correct verbal errors and to give them precision and clearness, their spirit and substance have, in all cases, been preserved." (Code commrs., Preface, Ann. Pen.Code (1st ed. 1872, Haymond & Burch, commrs.-annotators) p. vi.)

***456** Nor is the requirement under Penal Code section 1157 obscure or burdensome: "[The] rule is not arcane nor short on life. It is no Herculean task to require a jury finding on the degree of a murder." (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931, 58 Cal.Rptr.2d 244.) Moreover, as a safeguard against inadvertent failure to specify such a finding in the verdict, Penal Code section 1164 requires the trial court, before discharging the jury, to verify on the record that the jury has reached a verdict on all issues before it, including the degree of the crime charged.

The majority, in a desperate attempt to discredit the analysis in *People v. McDonald, supra,* 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, assert that we erroneously relied therein on an analysis of section 21--a "*different* statute with *different* language" (maj. opn., *ante,* at 98 Cal.Rptr.2d p. 447, 4 P.3d at p. 279)--that was presumptively rejected by the Legislature in enacting Penal Code section 1157 in 1872 (maj. opn., *ante,* at p. 448, 4 P.3d at p. 280). The argument is specious; it finds no support in the legislative history, which, as noted, evinces the intent of the Commission for Revision of the Laws to "preserv[e]" the "spirit and substance" of existing law. (Code commrs., ***927** Preface, Ann. Pen.Code, *supra,* at p. vi.) Nor is there any support in the legislative history for the majority's assertion that the Legislature, in amending Penal Code section 1157 in 1951, must have "believed and intended" that the statute would not apply in the case of felony ****288** murder. (Maj. opn., *ante,* at p. 444, 4 P.3d at p. 277.)

As we observed in *McDonald,* "had the Legislature chosen to make section 1157 inapplicable to cases in which the jury was instructed on only one degree of a crime, it could easily have so provided." (*People v. McDonald, supra,* 37 Cal.3d at p. 382, 208 Cal.Rptr. 236, 690 P.2d 709.) Instead, by its inaction, it has "effectively acquiesced" in this court's interpretation of the statute. (*People v. Bonillas* (1989) 48 Cal.3d 757, 804, 257 Cal.Rptr. 895, 771 P.2d 844 (conc. opn. of Arguelles, J.).) Indeed, entreated to do so by some members of this court (*ibid.*), the Legislature has considered--*and rejected*--proposed amendments to the statute that would have superseded our long-standing judicial construction of its requirements. (See Sen. Bill No. 2572 (1989-1990 Reg. Sess.) § 1; Assem. Bill No. 2402 (1997-1998 Reg. Sess.) § 1.) The majority are grasping at straws in speculating that it is "at least plausible" that the Legislature, after nearly 150 years of consistent decisions in point, was simply " 'looking to this Court to correct its error' in *McDonald.*" (Maj. opn., *ante,* 98 Cal.Rptr.2d at p. 284, fn. 11, 4 P.3d at p. 452, fn. 11.) Rather, it is more plausible to conclude that the Legislature's retention of the long-standing requirement that the trier of fact designate degree, despite various amendments and proposed amendments to the statute, implies its continued endorsement of that provision. (See *People v. Ledesma* (1997) 16 Cal.4th 90, 100-101, 65 Cal.Rptr.2d 610, 939 P.2d 1310 [failure to change statute raised the presumption of the Legislature's acquiescence]; *People v. Bouzas* (1991) 53 Cal.3d 467, 475, 279 Cal.Rptr. 847, 807 P.2d 1076; cf. *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 795, 38 Cal.Rptr.2d 699, 889 P.2d 1019 [defeat of repeated attempts to amend statute provided additional corroboration of legislative intent].)

Apparently impatient with the continued failure of the Legislature in this regard, the majority undertake to limit the scope of the statute by judicial fiat. Overruling our settled construction of the statute, and contrary to its plain language, they now hold that the statute does not apply in this case because felony murder is not a crime ***457** "distinguished into degrees." (Pen.Code, § 1157.) The predicate for such an exception is unsound. It is, of course, true that felony murder, like any other form of murder designated as a crime of the first degree, e.g., murder by poison, by lying in wait, by torture, or any willful, premeditated killing (Pen.Code, § 189), is not further divisible into degrees. But Penal Code section 1157 addresses *generic crimes,* e.g., murder, robbery, burglary, not specific forms of those offenses. Felony murder is not a separate or distinct offense; indeed, defendants in this ***928** matter were charged with, and found guilty of, the crime of "murder" in violation of Penal Code section 187, subdivision (a)--not the crime of "felony murder."

Abandoning the simple bright-line test of *McDonald* that required the verdict to specify on its face the degree of the crime, the majority substitute a new standard under which the failure of the jury to specify degree may be excused--or not--depending on the theory or theories argued by the prosecution. The majority's approach is neither simple nor clear-cut; it will inevitably require examination on a case-by-case basis of the unique facts and circumstances to determine whether Penal Code section 1157 applies. The potential for costly and time-consuming litigation is obvious. Such a result does not, in my view, justify the majority's exercise of what is more appropriately the legislative prerogative.

With regard to the verdicts herein, I agree with Justice Kennard, for the reasons cogently stated in her dissenting opinion, that the failure of the jury to determine the degree of murder of which it found Raul Antonio Valle guilty required that his conviction be deemed to be one of second degree murder. In my view, the same result is required in the case of Cruz Alberto Mendoza because, as in the case of Valle, although the jury found him guilty of the offense of murder, it failed to specify the degree of the crime in the verdict form; nor do the minutes record a verdict specifying the degree of the crime.

Thus, unlike Justices Kennard and Werdegar, I am not persuaded that the trial court's **289 polling of the jurors in the Mendoza case satisfied the requirements of Penal Code section 1157. After the verdict was rendered, finding Mendoza "guilty of the offense charged in Count I, a felony, to wit, murder in violation of Section 187(a) of the Penal Code of the State of California," the jurors were polled as to whether "that was your vote on the charge of murder 187 first degree" and each answered in the affirmative. But they had not been instructed to--and had not--deliberated on or reached a verdict fixing the degree of murder; indeed, Mendoza's request for an instruction requiring the jury to specify degree was rejected. Accordingly, the jurors did not endorse or assent to the verdict *actually returned and recorded in the minutes.* In effect, the trial court, in its polling of the jurors to determine unanimity of the verdict, merely imputed the additional finding to them; it did not purport to correct the verdict by such means or otherwise follow the appropriate procedures for doing so. (Cf. Pen.Code, § § 1163, 1164; *People v. Cain* (1995) 10 Cal.4th 1, 53-56, 40 Cal.Rptr.2d 481, 892 P.2d 1224; *People v. Schroeder* (1979) 96 Cal.App.3d 730, 734-735, 158 Cal.Rptr. 220; *People v. Galuppo* (1947) 81 Cal.App.2d 843, 850-851, 185 P.2d 335.)

***929** Penal Code section 1157, like the statute on which it was modeled, "establishes a rule to which there is to be no exception, and the Courts have no authority to create an exception when the statute makes none. [¶] We have no right to disregard a positive requirement of the statute, as it is not our province to make the laws, but to expound them." (*People v. Campbell, supra,* 40 Cal. at p. 138 [construing § 21 of the Act Concerning Crimes and Punishments].)

For these reasons, I would hold that the convictions of Cruz Alberto Mendoza and Raul Antonio Valle must be deemed second ***458** degree murder as a matter of law pursuant to Penal Code section 1157.

Accordingly, I dissent.

Dissenting Opinion By KENNARD, J.

Our Penal Code provides that certain defined murders are "of the first degree" while "[a]ll other kinds of murders are of the second degree." (Pen.Code, § 189.) The Penal Code also provides that whenever a crime is "distinguished into degrees," the jury "must" find the degree of the crime of which the defendant is guilty. (Pen.Code, § 1157; hereafter section 1157.) If the jury fails to so determine the degree, the crime "shall be deemed to be of the lesser degree." (*Ibid.*)

The majority holds that, contrary to the plain

language of these statutes, an unwritten exception exists to section 1157: According to the majority, murder is not always a crime divided into degrees, and a defendant should be convicted of first rather than second degree murder notwithstanding the jury's failure to determine the degree if the prosecution presents evidence that would support only a first degree murder conviction and the court so instructs the jury.

I disagree. The majority disregards not only the plain language of section 1157, which admits no exceptions, but also this court's consistent interpretation of section 1157 as requiring the jury to determine the degree regardless of the evidence or the instructions it receives. Rather than rewriting section 1157 to create a novel exception, I would follow its clear command.

I

Defendants Cruz Alberto Mendoza and Raul Antonio Valle were tried by means of the simultaneous presentation of evidence to two separate juries, which separately convicted each defendant of murder, robbery, and burglary. Each jury also found true robbery-murder and burglary-murder special circumstances. Each jury recorded its decisions on written verdict forms, but ***930** the forms did not specify the degree of murder for either defendant. In the case of Mendoza but not Valle, the court polled the jury, asking each juror whether "that was your vote on the charge of murder 187 *first degree*." (Italics added.) Each juror individually answered "yes." The trial court pronounced judgment sentencing each defendant to life without parole, the punishment for first degree murder with a special circumstance.

On appeal, both defendants contended that section 1157 required the reduction of their murder convictions to second degree murder. ****290** The Court of Appeal disagreed, holding that, even if the jury's failure to determine degree in the verdict forms violated section 1157, the harmless error provision of article VI, section 13 of the California Constitution applied to the error. The Court of Appeal concluded the errors here were harmless on the ground that the evidence and instructions supported only a conviction for first degree murder under a felony-murder theory, and not a second degree murder conviction.

II

At issue here is section 1157: "Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree." The prosecutor and the trial court bear responsibility for ensuring that the jury or the court complies with section 1157. (Pen.Code, § 1164, subd. (b); *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 77, 2 Cal.Rptr.2d 389, 820 P.2d 613.)

To properly understand the function of section 1157, it is first necessary to recognize two federal "constitutional protections *****459** of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 2355-2356, 147 L.Ed.2d 435], fn. omitted.) Section 1157 safeguards this right not to be convicted of the higher degree of a crime unless the trier of fact, whether judge or jury, has found all the elements constituting the higher degree of the crime. Although it might be constitutionally acceptable in cases where the trier of fact has not expressly stated ***931** the degree of the crime to reconstruct its intent from the evidence presented, the jury instructions, the arguments, the information, and other sources, the Legislature has chosen a higher degree of protection, as is its prerogative.

Murder is a crime divided into degrees. Penal Code section 189 divides murder into murders of the first degree and murders of the second degree. First degree murders as defined in section 189 include what are commonly referred to as felony murders--murders "committed in the perpetration of, or attempt to perpetrate," certain other crimes, including robbery. As we have previously recognized, in many homicides the evidence before the jury would permit it to return either a verdict of first degree murder under a felony-murder theory or a second degree murder verdict, in addition to other possible verdicts, depending upon what evidence the jury finds credible. (*People v. Jeter* (1964) 60 Cal.2d 671, 674-676, 36 Cal.Rptr. 323, 388 P.2d 355.)

The prosecution argues that section 1157 does not apply to a jury's failure to determine degree when, as here, the only theory of murder presented to the jury in the instructions and supported by the evidence was first degree murder based on a felony-murder theory. I disagree.

By its plain language, section 1157 applies without regard to the evidence the prosecution has presented in support of the crime or the instructions that the jury has received. Whenever the jury fails to determine the degree of a crime, the conviction by operation of law is "deemed to be of the lesser degree." (*Ibid.*) As the word "deemed" makes clear and as the entirety of section 1157 confirms, in such cases section 1157 makes no inquiry into what determination of degree the jury made or could have made under the facts of the case. Instead, to protect the constitutional rights of defendants the Legislature has created a bright-line rule that when the court and the prosecution fail in their duty to ensure that the jury expressly determines the degree of the crime, the conviction becomes one for the lesser degree of the crime. This is a policy ****291** judgment of the Legislature's that we are bound to respect.

Nor is the conclusion that section 1157 contains no exceptions novel. In *People v. McDonald* (1984) 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, the prosecution asserted that a verdict form finding the defendant guilty of murder without specifying the degree could nonetheless be construed as a first degree murder conviction under section 1157. It argued, as does the prosecution here, that the jury had impliedly found the defendant guilty of first degree murder, given that the jury was instructed only on first degree murder and given that it found true a robbery-murder special circumstance.

932** In an opinion Justice Mosk wrote for a unanimous court, we rejected that argument: "This precise contention has been rejected in a long line of decisions which require that the degree be explicitly specified by the verdict." (*People v. McDonald, supra,* 37 Cal.3d at p. 380, 208 Cal.Rptr. 236, 690 P.2d 709.) We continued: "[**460** T]he statute applies to reduce the degree even in situations in which the jury's intent to convict of the greater degree is demonstrated by its other actions.... [T]he key is not whether the 'true intent' of the jury can be gleaned from circumstances outside the verdict form.... [¶] ... [¶] ... [T]he terms of the statute are unambiguous. No special exception is created for the situation presented by this case; had the Legislature chosen to make section 1157 inapplicable to cases in which the jury was instructed on only one degree of a crime, it could easily have so provided. The statute requires that 'if the jury shall find the defendant guilty, the verdict shall specify the degree of murder.... It establishes a rule to which there is to be no exception, and the Courts have no authority to create an exception when the statute makes none.' " (*People v. McDonald, supra,* 37 Cal.3d at p. 382, 208 Cal.Rptr. 236, 690 P.2d 709, quoting *People v. Campbell* (1870) 40 Cal. 129, 138, 1870 WL 882.)

III

Applying section 1157 to the facts of this case yields these results: In the case of defendant Valle, the jury made no determination of the degree of the murder of which it found him guilty. Therefore, section 1157 deems his conviction to be one of second degree murder. In the case of defendant Mendoza, although the written verdict form did not specify the degree of murder, when the court subsequently polled the jurors and asked them whether their verdict was for "murder 187 first degree," they each responded "yes." This oral statement by the jury that Mendoza committed first degree murder is sufficient to satisfy section 1157, for there is no general requirement that the jury give its verdict in written form. (See Pen.Code, § § 1149, 1164.) Accordingly, his conviction is for first degree murder.

IV

To rescue the prosecution in this case from its failure to insist that the jury state its finding as to degree in the case of defendant Valle, the majority is forced to adopt a novel and unsupported interpretation of section 1157 that is contrary to the statute's plain language. The majority holds that in a murder case in which the prosecution presents evidence supporting only a first degree murder verdict, murder becomes a crime no longer divided into degrees. (Maj. opn., *ante,* 98 Cal.Rptr.2d at p. 436, 4 P.3d at p. 269.)

The effect of the majority's holding is to treat felony murder as though it were a separate crime. It is not, of course. Rather, it is only one of various ***933** alternative means by which one degree of murder may be committed. Doubtless, the Legislature could have chosen to create felony murder as a separate crime, rather than a form of one degree of murder; equally doubtless, it did not.

The majority ignores a fundamental principle of

statutory construction: In determining legislative intent, we begin with the language of the statute, however unwise, ill-crafted, or imprudent we may think it to be. When the statutory language on its face answers the question before us, that answer is binding unless we conclude the language is ambiguous and its plain meaning does not correctly reflect the Legislature's intent. (*People v. Broussard* (1993) 5 Cal.4th 1067, 1071-1072, 22 Cal.Rptr.2d 278, 856 P.2d 1134; ****292***Burden v. Snowden* (1992) 2 Cal.4th 556, 562, 7 Cal.Rptr.2d 531, 828 P.2d 672.)

In *People v. McDonald, supra,* 37 Cal.3d 351, 382, 208 Cal.Rptr. 236, 690 P.2d 709, this court concluded that section 1157 is unambiguous and applies to every murder case, regardless of the evidence or instructions presented to the jury. In rejecting this conclusion, the majority here makes no claim that section 1157 is ambiguous. Rather, it makes the much more remarkable and far-reaching claim that the *sole* "plain and commonsense meaning" of ***461section 1157 is that whether murder is a crime distinguished into degrees varies, depending on the factual theory of murder that the prosecution pursues. Nothing in section 1157, in section 189, or elsewhere in the Penal Code, however, even hints that whether a crime "is distinguished into degrees" depends on the evidence presented in a particular case rather than on whether the Legislature defined the crime in the Penal Code as a crime divided into degrees. Nor is there any suggestion in the Penal Code that the Legislature intended section 1157 to apply only to some and not all cases in which a jury has failed to determine the degree, depending on the evidence presented in support of the crime charged. The majority's rendering of section 1157 is not a plausible reading of section 1157, much less the sole plausible reading.

Even if the majority's eccentric reading of section 1157 were plausible enough to create a statutory ambiguity, however, the reasons presented by the majority would be insufficient to demonstrate that the majority's reading correctly reflects the Legislature's intent. In section 1157, the Legislature sought to advance justice and protect the rights of defendants. The means it chose was a bright-line rule that does not seek to discover what the jury actually but unspokenly decided as to the degree of the crime charged. Instead, under section 1157 a jury "must" in every case determine the degree. If it fails to, section 1157 "deem[s]" that as a matter of law the defendant may only be convicted of the lesser degree. The statute makes no exceptions to its rule.

***934** Section 1157 by its very nature may result in convictions for the lesser degree of the charged crime in some cases where the jury has probably intended to convict defendant of the greater crime but has failed to expressly state that finding. The Legislature, however, has chosen not to have courts make a case-by-case inquiry into the jury's unstated conclusions to attempt to divine what degree of crime the jury found.

The majority's position is founded on the fallacy that it is absurd and contrary to section 1157's purpose for the Legislature to advance its goal of protecting defendants by means of a bright-line rule. That the Legislature has chosen a bright-line rule that may result in a conviction for the lesser degree in some cases in which the jury would have convicted of the greater degree, however, does not make it absurd to apply the rule to those cases nor does it authorize us to rewrite the rule. There is nothing absurd in deferring to the plain language of Penal Code section 1157 and concluding that the Legislature intended the section to apply to all murder convictions, not just convictions based on certain theories of murder and not others. And it is fully consonant with, not contrary to, section 1157's purpose of protecting the rights of defendants to require in every case that a defendant not be convicted of the highest degree of a crime except when a jury expressly so finds on the record.

By judicially inventing an exception to section 1157 that the Legislature has chosen not to enact, the majority usurps the Legislature's authority. Had the Legislature intended such an exception, it could have easily enacted one, as this court noted in *People v. McDonald, supra,* 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, and as proposed legislation that the Legislature considered and rejected in 1990 and 1998 illustrates.

In 1990, a bill introduced in the Legislature would have permitted the following if the jury failed to expressly determine the degree: "[T]he trial court or an appellate court may fix the degree ... if it is able to determine from other jury findings in the same case the degree the jury intended to fix. If this determination cannot be made, ... [on timely motion] the defendant shall be entitled to a hearing ... before a new jury to determine the degree...." (Sen. Bill No. ****293** 2572 (1989-1990 Reg. Sess.) § 1.) This bill was not enacted, and instead the ***462** Legislature amended Penal Code section 1164 in 1990 to require trial courts, before discharging a jury, to verify on the

record that the jury has determined the degree of the crime.

In 1998, another bill introduced in the Legislature would have permitted the trial court to determine the degree from the "admitted evidence, the charging instrument, jury instructions given, or other jury findings that were ***935** made" and to "set the degree at the higher level where there is clear and reliable evidence to support such a determination." (Assem. Bill No. 2402 (1997-1998 Reg. Sess.) § 1.) If the court was not able to determine the degree, it could then "either set the degree at the lower level or order a new trial, the sole issue of which shall be the determination of degree." (*Ibid.*) The bill was then amended to provide that section 1157 "shall only apply to the situation where the finder of fact has a choice as to the degree" and that "If the crime ... for which the defendant was convicted is a specified degree as a matter of law, upon the failure of the jury to determine the degree ..., the court may fix the degree as specified. In determining whether the degree of the offense is a specified degree as a matter of law, the court may refer to the descriptive substantive definitions contained in the charging document, any factual finding contained in the verdict form, the fact that the jury was only instructed on a specified degree and not any lesser degree, or the fact that the jury was only instructed on one theory of the case." (Assem. Amend. to Assem. Bill No. 2402 (1997-1998 Reg. Sess.) Apr. 29, 1998.) This bill too was never enacted.

The majority also rejects as dictum this court's conclusion in *People v. McDonald, supra,* 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, that section 1157 applies in murder cases prosecuted under a felony-murder theory. Whether or not it is dictum is irrelevant, for it is soundly reasoned and reaches the most sensible interpretation of section 1157. Moreover, this interpretation finds support in 150 years of California law, as I discuss next.

Section 1157 derives from a statute originally enacted in 1856 that accomplished several purposes. (Stats. 1856, ch. 139, § 2, p. 219; hereafter the 1856 statute.) The 1856 statute was the first to divide the crime of murder into degrees; previously, murder had been a unitary crime. In doing so, the 1856 statute assigned murder committed in the course of certain felonies to the category of first degree murder. (*Ibid.*) Finally, it required the jury to determine the degree of murder. It accomplished all of this in a single sentence: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree...." (*Ibid.*)

There is no doubt, and the majority does not dispute, that the plain language of the 1856 statute required the jury in every murder case to ***936** specify the degree of the murder, regardless of the evidence or argument presented in support of the charge. This court so held 130 years ago in *People v. Campbell, supra,* 40 Cal. 129, 138, where we specifically rejected the argument that no determination of degree was necessary if "it is not possible, from the nature of the case, that the accused could be lawfully convicted of murder in the second degree." The court stated: "We have no right to disregard a positive requirement of the statute, as it is not our province to make laws, but to expound them.... The word 'designate,' as here employed, does not imply that it will be sufficient for the jury to intimate or give *****463** some vague hint as to the degree of murder of which the defendant is found guilty; but it is equivalent to the words 'express' or 'declare,' and it was evidently intended that the jury should expressly state the degree of murder in the verdict so that nothing should be left to implication on that point.... However absurd it may, at the first blush, appear to be to require the ****294** jury to designate the degree of the crime, when it appears on the face of the indictment that the offence charged has but one degree, there are plausible and, perhaps, very sound reasons for this requirement.... But whatever may have been the reasons for this enactment, it is sufficient for the Courts to know that the law is so written and it is their duty to enforce it." (*Id.* at pp. 138-140.)

It would have been absurd for the court in *People v. Campbell, supra,* 40 Cal. 129, to reach a contrary result. That would have required concluding that, even though the 1856 statute in the same sentence both defined first degree murder to include killings committed in the course of certain felonies and required juries to find the degree of the murder committed, the latter portion of the sentence unaccountably did not apply to the earlier portion.

In 1872, as part of the general codification of California law, the 1856 statute was replaced by

section 1157. As originally enacted as part of the Penal Code of 1872, section 1157 provided: "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Section 1157 did change the 1856 statute, but it did so by generalizing the rule's application from the crime of murder alone, as was the case under the 1856 statute, to every crime "distinguished into degrees." The majority here suggests that, by deleting the reference to murder indictments that had been present in the 1856 statute, the Legislature in 1872 intended to abrogate this court's decision in *People v. Campbell, supra,* 40 Cal. 129. Obviously, however, the purpose of deleting the reference to murder indictments was to broaden the statute's application to include all crimes of degree, not to narrow its application to include only some cases of murder. Nor is there any evidence in the legislative history of the 1872 version of section 1157 that it was intended to narrow the 1856 ***937** statute. The annotations made to section 1157 by the commissioners who drafted it as part of the 1872 Penal Code cite *Campbell* with apparent approval and without any suggestion that section 1157 was intended to abrogate *Campbell*'s holding. (Code commrs., note foll. Ann. Pen.Code, § 1157 (1st ed. 1872, Haymond & Burch, commrs.-annotators) pp. 404-405.)

Moreover, section 5 of the Penal Code, enacted as part of the 1872 codification and continuing in effect to this day, provides: "The provisions of this Code, so far as they are *substantially* the same as existing statutes, must be construed as continuations thereof, and not as new enactments." (Italics added.) Because section 1157 is substantially the same as the 1856 statute, especially with respect to the crime of murder, "the codified act carries the same [judicial] interpretation as the original one." (*People v. Ellis* (1928) 204 Cal. 39, 44, 266 P. 518 [concluding the bigamy prohibition enacted as part of the 1872 Penal Code should be interpreted the same as pre-1872 bigamy statute, despite significant changes in wording between the two provisions].) That is, we must interpret section 1157 as this court interpreted the 1856 statute in *People v. Campbell, supra,* 40 Cal. 129.

And this court has done so. In 1887, 15 years after the enactment of section 1157, this court relied on *People v. Campbell, supra,* 40 Cal. 129, in interpreting section 1157, explaining its reliance in these terms: "The [1872 Penal] [C]ode has extended this provision to all crimes 'distinguished into degrees.' Therefore the construction given to the clause of the [1856] statute as it existed before the code, in murder cases, may guide us in construing it in its broader *****464** application." (*People v. Travers* (1887) 73 Cal. 580, 581, 15 P. 293.)

Since 1872, section 1157 has been amended three times. It was amended in 1949 to provide that the consequence of a jury's failure to specify degree is a conviction for the lesser degree rather than, as formerly, a new trial. (Stats.1949, ch. 800, § 1, p. 1537.) It was then amended in 1951 to expand its scope to include convictions in court trials as well as jury trials. (Stats.1951, ch. 1674, § 109, p. 3849.) It was again amended in 1978 to expand its scope to include convictions for attempts to commit crimes of degree. (Stats.1978, ch. 1166, § 4, p. 3771.) All three amendments retained unchanged the "crime ... distinguished into degrees" ****295** formulation of the original 1872 version of section 1157 and none of them evidenced any intention to limit the application of section 1157 in cases where the prosecution presents evidence directed at only a single degree of a crime.

As this review shows, the majority subverts both the plain language and the long history of section 1157 when it concludes that the statute contains ***938** an unwritten exception whose application depends upon the evidence presented by the prosecution. There is no basis at this late date to change course and abandon our settled conclusion that the statute governs in all cases in which the jury fails to determine degree, an interpretation which faithfully adheres to the statute's plain language.

V

The prosecution argues that, even if defendant Valle's jury failed to comply with section 1157, the judgment imposing on him a first degree murder sentence should be affirmed under article VI, section 13 of the California Constitution (hereafter article VI, section 13). That section provides: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (*Ibid.*)

Article VI, section 13 does not salvage the trial court's judgment punishing Valle for first degree

murder. Once the jury returned a verdict of murder without specifying the degree and was discharged, section 1157 made Valle's conviction one for second degree murder by operation of law. The error here was the trial court's failure to recognize that Valle's conviction was for second degree murder and to sentence him accordingly. This error was obviously prejudicial to Valle, resulting in an illegal sentence exceeding the maximum permitted for a second degree murder conviction.

CONCLUSION

For the reasons given above, I would affirm the first degree murder conviction of defendant Mendoza, while I would reduce the first degree murder conviction of defendant Valle to second degree murder.

WERDEGAR, J., concurs.

Dissenting Opinion By WERDEGAR, J.

I dissent, albeit reluctantly. The majority opinion amply illustrates the illogic of a strict application of Penal Code [FN1] section 1157 to the facts of this case. The People proceeded solely on a first degree felony-murder theory when prosecuting defendants; the jury was instructed solely on first degree murder; and, on the facts of this case, the only reasonable verdict for the homicide-related counts was murder in the first degree or ***939** acquittal. A judgment of murder in the second degree has no factual predicate and, as the majority explains (maj. opn., *ante,* 98 Cal.Rptr.2d at p. 442, 4 P.3d at p. 275), had the jury ****465** returned a second degree verdict, the trial court could have refused to accept it, reinstructed the jury, and directed it to reconsider its verdict. (See § 1161.) Accordingly, reducing defendant Raul Antonio Valle's [FN2] conviction to murder in the second degree is artificial, fails to reflect his true culpability, and is not a just result for this murderer.

FN1. All statutory references are to this code.

FN2. I agree with Justice Kennard that the polling of the jury provides sufficient justification to conclude the degree of defendant Valle's murder conviction must be lowered, but that of his codefendant Cruz Alberto Mendoza need not be.

Nevertheless, the issue raised in this case transcends our concern that Valle's conviction reflect his true culpability. The history of section 1157, including the recent amendments to both sections 1157 and 1164, subdivision (b), demonstrates persuasively that the Legislature has acquiesced to the fairly rigid interpretation this court has given to section 1157. As explained in Justice Kennard's dissenting opinion, that interpretation, which would require lowering the degree of the ***296** murder for defendant Valle, is one of almost ancient lineage.

Section 1157 represents a legislative response to the situation where a jury, in convicting a defendant of an offense divided into degrees, fails to specify the degree of the offense. As the majority explains (maj. opn., *ante,* 98 Cal.Rptr.2d at p. 443, 4 P.3d at p. 276), before the Legislature in 1949 amended section 1157 to provide that in such circumstances the degree of the crime shall be deemed the lesser degree, the judicially declared rule was that a jury's failure to determine degree entitled the defendant to a new trial. Section 1157, therefore, represents the Legislature's considered decision, in fashioning a just remedy for the error, to reject retrial as a remedy. In so doing, the Legislature balanced a variety of factors. These include, on the one hand, the financial cost of retrial, the emotional cost to the victims and other witnesses who must again testify at the retrial, and the possibility the defendant could be acquitted on retrial. Balanced against these costs, on the other hand, are a defendant's constitutional right to have a jury decide all the elements of the charged crime, the infrequency of the error, the ability of the prosecutor to call attention to an omission before the jury is discharged, the statutory duty of the trial court to ensure--and verify on the record--that the jury has reached a verdict on the degree of the crime (§ 1164, subd. (b)), and fairness to the defendant, who would have to run the gauntlet a second time. The Legislature's solution was to eschew retrial, but to reduce the offense to the lesser degree as a matter of law.

That the Legislature's resolution of this problem is not necessarily the one I would have chosen is of no consequence; it is the one the Legislature did ***940** choose and has adhered to. Nor is it, as the majority proclaims, an "absurd" policy choice (maj. opn., *ante,* 98 Cal.Rptr.2d at pp. 443-444, 4 P.3d at pp. 276-277). To balance the complex policy concerns involved in cases in which the jury fails to specify the degree of a crime, and conclude a clear bright-line rule should govern, is not absurd even in those few cases in which a guilty defendant might obtain an unjust benefit.

In any event, it appears the Legislature has acquiesced to this court's long-standing interpretation

of section 1157, and we are not at liberty to disregard its views. Judicial restraint and respect for the Legislature's work compel that we adhere to our previous interpretations absent some indication the Legislature intends some different meaning. " '[A]s this court has often recognized, the judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government....' ***466(*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 675 [47 Cal.Rptr.2d 108, 905 P.2d 1248] (conc. opn. of Werdegar, J.).) It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. 'This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.' " (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, 59 Cal.Rptr.2d 671, 927 P.2d 1175, quoting *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365, 5 P.2d 882.)

Members of this court and of the lower appellate courts have urged the Legislature to look at section 1157 anew (see *People v. Bonillas* (1989) 48 Cal.3d 757, 803, fn. 3, 257 Cal.Rptr. 895, 771 P.2d 844 (conc. opn. of Arguelles, J.), and cases cited), explaining in strong language the anomalous results that can occur from a strict application of the statute (see, e.g., *People v. Thomas* (1978) 84 Cal.App.3d 281, 285, 148 Cal.Rptr. 532 (conc. opn. of Ashby, J.) [strict application of § 1157 requires appellate court "to exalt form over substance"]). The Legislature, in 1990, responded by amending section 1164 to require that trial courts, before discharging the jury, ensure that the jury rendered a verdict on the degree of the crime. (Stats.1990, ch. 800, § 1, p. 3548; see *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 73, fn. 15, 2 Cal.Rptr.2d 389, 820 P.2d 613 [urging "strict compliance [with § 1164] to forestall procedural quagmires"].) This amendment to section 1164 was the Legislature's **297 way of addressing the problem; we should honor the legislative choice.

Although the majority's reinterpretation of section 1157 admittedly would impose on defendant Valle a sentence commensurate with his culpability, I *941 find I cannot endorse the majority's reasoning without intruding on the role of the Legislature. Accordingly, until that body amends section 1157 to change the statute's meaning from the bright-line rule it now provides to one permitting an examination of the individual facts of each case, I would reluctantly adhere to our previous interpretation of that statute (*People v. McDonald* (1984) 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709; *People v. Beamon* (1973) 8 Cal.3d 625, 629, fn. 2, 105 Cal.Rptr. 681, 504 P.2d 905) and therefore dissent.

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34 Cal.App.4th 1809
34 Cal.App.4th 1809, 41 Cal.Rptr.2d 182
(Cite as: 34 Cal.App.4th 1809)

▷

TIMOTHY P. PELTIER, Plaintiff and Appellant,
v.
McCLOUD RIVER RAILROAD COMPANY,
Defendant and Respondent.

No. C018729.

Court of Appeal, Third District, California.

May 22, 1995.

SUMMARY

A person seeking damages for work-related injuries filed an action against a railroad company, but the action was dismissed for failure to bring the case to trial within three years (Code Civ. Proc., § 583.410) . Plaintiff moved to vacate the dismissal on the ground of the mistake or neglect of counsel (Code Civ. Proc., § 473) in deciding not to move the case forward until the extent of plaintiff's injuries could be determined, but the trial court issued an order denying the motion. (Superior Court of Siskiyou County, No. 44188, Robert F. Kaster, Judge.)

The Court of Appeal affirmed. The court held that the order denying plaintiff's motion to vacate the dismissal was appealable. Although, as a general rule, an order denying a Code Civ. Proc., § 473, motion to set aside a discretionary dismissal is not appealable, newly revealed facts, or the hitherto unrevealed impact of known facts, may demonstrate that the moving party was effectually deprived of a meaningful opportunity to defend against the original motion, thus warranting an appeal from the denial of the motion rather than from the dismissal itself. Plaintiff introduced new evidence on the motion to vacate, namely his counsel's declaration for the first time taking full responsibility for the delay in prosecution of the case. Moreover, for the first time, plaintiff tendered the argument that Code Civ. Proc., § 473, itself operated so as to compel the setting aside of the dismissal, and this argument tendered a hitherto unrevealed impact of known facts. However, the court held that the dismissal was not required to be set aside on the grounds asserted by plaintiff. Although Code Civ. Proc., § 473, provides that a plaintiff is entitled to relief from "any ... dismissal" due to attorney mistake, inadvertence, surprise, or neglect, when the Legislature amended the statute to include this provision, it left the discretionary dismissal statutes (Code Civ. Proc., § 583.410 et seq.) intact. The Legislature intended to reach only those dismissals which occur through failure to oppose a dismissal motion, that is, those dismissals which are procedurally equivalent to defaults. Code Civ. Proc., § 473, cannot be considered in isolation, but must be harmonized with other statutes relating to dismissals. Further, the legislative ***1810** history of the statute does not support an intent to put all dismissed plaintiffs on an equal footing with defaulting defendants. The court also held that, to the extent plaintiff's motion to vacate the dismissal restated and reargued facts and arguments tendered at the original motion to dismiss, it was properly denied, since a motion for relief from dismissal may not be used merely to amplify or supplement the evidence and arguments that were presented in opposition to the original motion to dismiss. (Opinion by Sims, Acting P. J., with Scotland and Brown, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Dismissal and Nonsuit § 42--Involuntary Dismissal--Relief--Mistake or Neglect of Counsel--Order Denying Relief as Appealable.
The trial court's order denying plaintiff's motion to vacate the involuntary dismissal of his action for failure to bring the case to trial within three years, on the ground of the mistake or neglect of counsel (Code Civ. Proc., § 473), was appealable. Although, as a general rule, an order denying a § 473 motion to set aside a discretionary dismissal is not appealable, newly revealed facts, or the hitherto unrevealed impact of known facts, may demonstrate that the moving party was effectually deprived of a

meaningful opportunity to defend against the original motion, thus warranting an appeal from the denial of the motion rather than from the dismissal itself. Plaintiff introduced new evidence on the motion to vacate, namely his counsel's declaration for the first time taking full responsibility for the delay in prosecution of the case. Moreover, for the first time, plaintiff tendered the argument that § 473 itself operated so as to compel the setting aside of the dismissal, and this argument tendered a hitherto unrevealed impact of known facts. Further, the rule established by the Supreme Court that an order denying a § 473 motion to vacate a default is not appealable was not applicable, since the rule applies only to such motions that seek relief from the ministerial act of entry of default, not from default judgments or orders of dismissal.

(2a, 2b, 2c, 2d, 2e) Dismissal and Nonsuit § 40--Involuntary Dismissal--Relief--Mistake or Neglect of Counsel--As Warranting Relief Only From Failure to Oppose Dismissal Motion.
The dismissal of plaintiff's civil action for failure to bring the case to trial within three years (Code Civ. Proc., § 583.410) was not required to be set aside on the ground of the mistake or neglect of counsel (Code Civ. Proc., § 473) in deciding, ***1811** for tactical reasons, not to move the case forward. Although Code Civ. Proc., § 473, provides that a plaintiff is entitled to relief from "any ... dismissal" due to attorney mistake, inadvertence, surprise, or neglect, when the Legislature amended the statute to include this provision, it left the discretionary dismissal statutes (Code Civ. Proc., § 583.410 et seq.) intact. The Legislature intended to reach only those dismissals which occur through failure to oppose a dismissal motion, that is, those dismissals which are procedurally equivalent to defaults. Code Civ. Proc., § 473, cannot be considered in isolation, but must be harmonized with other statutes relating to dismissals. Further, the legislative history of the statute does not support an intent to put all dismissed plaintiffs on an equal footing with defaulting defendants. Also, case authority prior to the addition of the dismissal provisions construed Code Civ. Proc., § 473, with respect to dismissals as a provision for relief from failure to oppose dismissal motions, not as a detour around the dismissal statutes. Had the Legislature intended to abrogate those cases, it would have said so expressly.

[See 6 **Witkin,** Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 204B.]

(3) Statutes § 48--Construction--Reference to Other Laws--Harmonizing Statutes Dealing With Same Subject.
The courts must harmonize statutes dealing with the same subject if possible and avoid interpreting a statute in a way which renders another statute nugatory.

(4) Statutes § 42--Construction--Aids--State Bar's View of Meaning of Proposed Legislation.
The view of the State Bar of California concerning the meaning of proposed legislation, even if it authored that legislation, is not an index of legislative intent.

(5) Statutes § 45--Construction--Presumptions--Legislative Acquiescence in Construction of Statute by Courts.
When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute. "Reenactment" of a statute under this rule of construction may include substantive amendments.

(6) Statutes § 16--Repeal--By Implication--As Disfavored.
The repeal or abrogation of statutes by implication is disfavored, as is any construction of a statute that would render related statutes a nullity. ***1812**

(7) Dismissal and Nonsuit § 40--Involuntary Dismissal--Relief--Necessity to Present New Evidence.
To the extent plaintiff's motion, pursuant to Code Civ. Proc., § 473, to vacate the dismissal of his civil action for failure to bring the case to trial within three years (Code Civ. Proc., § 583.410) restated and reargued facts and arguments tendered at the original motion to dismiss, it was properly denied, since a motion for relief from dismissal may not be used merely to amplify or supplement the evidence and arguments that were presented in opposition to the original motion to dismiss.

COUNSEL

34 Cal.App.4th 1809
34 Cal.App.4th 1809, 41 Cal.Rptr.2d 182
(Cite as: 34 Cal.App.4th 1809)

E. Elizabeth Summers, Elliot L. Bien, Hildebrand, McLeod & Nelson and Anthony S. Petru for Plaintiff and Appellant.

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SIMS, Acting P. J.

The trial court dismissed plaintiff Timothy P. Peltier's personal injury suit for failure to bring the case to trial within three years (Code Civ. Proc., § 583.410; all further undesignated section references are to this code). He moved for relief under section 473, asserting that his attorney's decision not to move the case forward until plaintiff's condition had stabilized constituted mistake or neglect within the meaning of that provision. Denied relief in the trial court, he makes the same contention here. We shall affirm.

Background

On June 28, 1990, plaintiff filed an action against defendant McCloud River Railroad Company seeking damages for work-related injuries under the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.). Defendant answered the complaint on October 11, 1990. Discovery ensued, and defendant took plaintiff's deposition on April 5, 1991. Plaintiff took no further action to move the case forward for 22 months.

On March 4, 1993, plaintiff filed an at-issue memorandum and a certificate of readiness for trial. However, following plaintiff's failure to file a pretrial conference statement as ordered by the trial court, the matter was dropped from the calendar. ***1813**

On July 15, 1993, defendant moved to dismiss the case for failure to bring to trial within three years.

On August 18, 1993, plaintiff filed opposition to the motion. His counsel asserted that he had not moved the case forward faster because plaintiff's condition had deteriorated following his deposition in April 1991, rendering his ultimate damages uncertain, and that his condition had remained unstable from then on, even after counsel filed the at-issue memorandum in April 1993.

Following defendant's response, the trial court entered a minute order dismissing the complaint on September 8, 1993. A formal order ensued on September 29, 1993.

On September 18, 1993, counsel moved for reconsideration under section 1008, asserting that he had been unable to obtain an expert opinion as to causation until April 29, 1992. Following defendant's opposition to the motion, on October 27, 1993, the trial court denied the motion on the ground that it failed to state new or different facts as required by section 1008.

On November 8, 1993, plaintiff filed a notice of appeal from the order of dismissal and the order denying reconsideration. On December 20, 1993, however, after retaining new counsel, he abandoned this appeal and moved to vacate the dismissal under section 473. [FN1]

FN1 Section 473 provides as relevant: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any ... resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.... However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310."
The references to dismissals and to section 583.310, the five-year mandatory dismissal statute, were added by amendment in 1992. (Stats. 1992, ch. 876, § 4.)

Plaintiff's section 473 motion argued that the dismissal of his case stemmed from the mistake or neglect of counsel because his former attorney had allegedly failed to move the case forward due to a mistaken legal strategy. If the trial court believed the attorney's explanation of his strategy in his opposition to the dismissal motion but found it legally insufficient, this proved "mistake," while if

the court suspected that this strategy was not the real reason for the delay (as defendant had argued), the court in effect found "neglect."

In support of his motion plaintiff submitted a declaration from his former attorney, who averred that whether or not the trial court had believed his ***1814** explanation of his strategy "the decision to proceed at the pace and as plaintiff did [*sic*] was solely mine."

Following opposition, the trial court issued an order denying the motion on May 5, 1994.

Plaintiff filed a notice of appeal from the order denying his motion to vacate the dismissal of the action.

Discussion

I

(1) Before reaching the merits of plaintiff's arguments concerning section 473, we must address defendant's contention that the order denying the section 473 motion is not appealable. As will appear, this contention lacks merit.

More than 30 years ago, in *Daley v. County of Butte* (1964) 227 Cal.App.2d 380 [38 Cal.Rptr. 693], this court had occasion to determine whether the denial of a section 473 motion, seeking to set aside a discretionary dismissal, was appealable. Concluding the order was appealable, we said, "As a general rule, such an order is not appealable. [Citations.] The theory is that a plaintiff may not utilize an appeal from an order refusing to vacate as an indirect means of attacking an appealable order of dismissal. [¶] A party seeking under section 473 to relieve himself of a dismissal injects into the case new elements of mistake, inadvertence, surprise and excusable neglect. Newly revealed facts, or the hitherto unrevealed impact of known facts, may demonstrate that the moving party was effectually deprived of a meaningful opportunity to defend against the original motion. The newly revealed circumstances may also persuade the trial court that the dismissal should not have been ordered, that it would not have been ordered had the plaintiff an opportunity to present the circumstances to the court in the first instance. Thus, the discretion of the trial court in disposing of the motion to vacate will be affected or controlled by facts not before it on the original hearing [citation]; and the action of the appellate court will be based upon a record not available to the plaintiff had he appealed from the dismissal itself." (*Daley v. County of Butte*, *supra*, 227 Cal.App.2d at pp. 388-389.)

Here, plaintiff introduced new evidence on the motion to vacate, to wit, counsel's declaration for the first time taking full responsibility for the delay in prosecution of the case. Moreover, for the first time, plaintiff tendered the argument that section 473 itself operated so as to compel setting aside of the ***1815** dismissal. This latter ground tendered a "hitherto unrevealed impact of known facts." (*Daley v. County of Butte*, *supra*, 227 Cal.App.2d at p. 388 .) In short, under *Daley*, the order denying the motion to vacate the dismissal is appealable.

Defendant asserts, however, that our Supreme Court has recently held that orders denying section 473 motions are not directly appealable and may be reviewed only on appeal from the underlying judgment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 [35 Cal.Rptr.2d 669, 884 P.2d 126].) Noting that plaintiff abandoned his appeal from the judgment of dismissal, defendant concludes that since there is no appeal from the underlying judgment before us *Rappleyea* bars us from entertaining plaintiff's appeal from the order denying his section 473 motion. Defendant reads *Rappleyea* too broadly.

In the passage defendant relies on, the Supreme Court states: "[T]he order denying the motion to vacate *the default* is not independently appealable.... However, there is authority for the view that it may be reviewed on an appeal from the judgment ...." (*Rappleyea v. Campbell*, *supra*, 8 Cal.4th at p. 981, citations omitted, italics added.) As the court's recital of the facts makes clear, defendants' "motion for relief from default" responded to the court clerk's entry of default, not to a default judgment. (*Id.* at p. 980.) The clerk's entry of default is a ministerial act which precedes the actual judgment. (§ 585, subds. (a), (b).) Because it is not a judgment, an appeal from it will not lie. (*Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1465- 1466 [258 Cal.Rptr. 907].) By contrast, an order of dismissal, like a default judgment, is a judgment for purposes of appeal. (§ 581d.) Thus,

Rappleyea's holding applies only to section 473 motions which seek relief from the ministerial act of entry of default, not from default judgments or orders of dismissal. (See also *Jade K. v. Viguri*, *supra*, 210 Cal.App.3d at p. 1465.)

We conclude the order denying plaintiff's motion to vacate is appealable. (*Daley v. County of Butte*, *supra*, 227 Cal.App.2d at pp. 388-389.)

II

(2a) Since its amendment in 1992, section 473 has provided that a plaintiff is entitled to relief from "any ... dismissal" if he files a timely motion for relief in proper form alleging the dismissal was caused by attorney "mistake, inadvertence, surprise, or neglect" and supports the motion with an affidavit by his attorney (or former attorney, as here) so attesting, unless the trial court finds that the dismissal was not in fact so ***1816** caused. (See fn. 1, *ante*.) However, when the Legislature amended section 473 to include this provision, it left the discretionary dismissal statutes (§ 583.410 et seq.) intact. Under these statutes, the trial court may dismiss an action for failure to serve the complaint within two years or to bring the case to trial within three years (§ 583.420, subd. (a)), exercising its discretion according to the criteria prescribed by the Judicial Council. (§ 583.410, subd. (b); Cal. Rules of Court, rule 373(e).)

In our experience, nearly every discretionary dismissal is caused by the mistake, inadvertence or neglect of the plaintiff's attorney. Thus, although section 473 does not directly conflict with the discretionary dismissal statutes, its literal terms suggest that the vast majority of plaintiffs whose actions are dismissed under section 583.410 et seq., on account of attorney neglect, may obtain mandatory relief from dismissal by filing an appropriate motion under section 473. [FN2] If so, then section 473 in effect nearly nullifies the discretionary dismissal statutes, as few dismissals entered thereunder would ever assuredly be final.

> FN2 Moreover, the fact that the 1992 amendment to section 473 contained a specific exclusion for mandatory dismissals under the five-year rule (§ 583.310) appears to strengthen the inference that the Legislature meant to include all discretionary dismissals within the scope of the amended statute, on the principle *inclusio unius est exclusio alterius*. So plaintiff argues, at any rate. As will appear, we reject this inference because we cannot agree with plaintiff that the literal terms of section 473 control.

(3) We must harmonize statutes dealing with the same subject if possible (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323]) and avoid interpreting a statute in a way which renders another statute nugatory. (*People v. Craft* (1986) 41 Cal.3d 554, 561 [224 Cal.Rptr. 626, 715 P.2d 585].) " '[T]he "plain meaning " rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.]" (*People v. King* (1993) 5 Cal.4th 59, 69 [19 Cal.Rptr.2d 233, 851 P.2d 27], quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) (2b) Therefore we cannot construe section 473 literally if there is any other reasonable interpretation which would give effect to the Legislature's apparent purpose in enacting the 1992 amendment. ***1817**

Since the trial court ruled on plaintiff's section 473 motion in this case, two appellate courts have considered this question: Division Three of the Fourth District (*Tustin Plaza Partnership v. Wehage* (1994) 27 Cal.App.4th 1557 [33 Cal.Rptr.2d 366] [in dicta]) and Division Six of the Second District (*Graham v. Beers* (1994) 30 Cal.App.4th 1656 [36 Cal.Rptr.2d 765]). Both courts rejected a literal interpretation of section 473 and found a way to construe it so as to harmonize it with the discretionary dismissal statutes. According to the majority in *Tustin* and the unanimous court in

Graham, when the Legislature incorporated dismissals into section 473 it intended to reach only those dismissals which occur through failure to oppose a dismissal motion-the only dismissals which are procedurally equivalent to a default. (*Graham*, *supra*, 30 Cal.App.4th at pp. 1660-1661; *Tustin*, *supra*, 27 Cal.App.4th at pp. 1565-1566.) For reasons that follow, we adopt this interpretation of section 473 and reject plaintiff's literal reading of the statute.

Tustin and Graham.

In *Tustin*, *supra*, the majority noted that by failing to amend the discretionary dismissal statutes and their references to the California Rules of Court at the same time it amended section 473, "... the Legislature left the trial court's discretion undisturbed in determining whether attorney neglect excuses the delay [in bringing a case to trial]." (*Tustin Plaza Partnership v. Wehage*, *supra*, 27 Cal.App.4th at p. 1564.) The majority concluded that the Legislature thus intended to set in place "two different standards ... in evaluating attorney neglect: discretion pursuant to California Rules of Court formulae for section 583.410 determinations of whether to grant a dismissal, and a no-questions-asked policy for relief from default or dismissal under section 473." (*Ibid.*) This result made sense, according to the majority, because "[a] rule allowing attorney neglect to *automatically* excuse delay would totally undermine the public policies underlying section 583.410 ...." (*Ibid.*, italics in original.) Therefore, in the majority's view, the new language of section 473 can apply only to cases where a motion for dismissal was originally unopposed: a motion for relief accompanied by an attorney affidavit attesting to mistake or neglect in failing to oppose the motion would automatically entitle the plaintiff to "a chance to *respond* to an otherwise unopposed [motion] for dismissal[,]" like that which a defendant who had defaulted by failing to respond to an action had already been able to obtain under section 473. [FN3] (*Tustin*, *supra*, 27 Cal.App.4th at pp. 1565-1566, italics in original; see ***1818***Williams v. Los Angeles Unified School Dist.* (1994) 23 Cal.App.4th 84, 105 [28 Cal.Rptr.2d 219]; *Wilcox v. Ford* (1988) 206 Cal.App.3d 1170, 1176 [254 Cal.Rptr. 138].)

FN3 A concurring and dissenting justice not only pointed out that the majority's discussion was dictum (since the appellant had failed to raise the issue below), but disagreed with the majority's analysis of section 473. He concluded by accusing his colleagues of indulging in the form of "judicial eagerness" characterized by Witkin as "Have opinion, need case." (*Tustin Plaza Partnership v. Wehage*, *supra* , 27 Cal.App.4th at p. 1567 (conc. and dis. opn. of Wallin, J.).)

In *Graham*, *supra*, the effect of the 1992 amendment to section 473 was squarely before the court: as here, the dismissed plaintiff moved for relief under the statute and submitted an affidavit in which his attorney called a misguided decision to delay prosecution "mistake or neglect." (*Graham v. Beers*, *supra*, 30 Cal.App.4th at pp. 1659-1660.) To resolve the issue the court cited the *Tustin* majority's "forceful dicta" with approval and adopted its reasoning. (*Graham*, *supra*, 30 Cal.App.4th at pp. 1660-1661.) Acknowledging that the unqualified reference to mandatory relief from "any ... dismissal" in section 473 as amended presents a "troubling" facial conflict with section 583.410, the court used the constructional rule that statutes relating to the same subject must be harmonized if possible, giving consideration to the consequences of a particular interpretation (*Dyna-Med, Inc.* v. *Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at p. 1387), as a tie-breaker. Like the *Tustin* majority, the *Graham* court concluded that the consequence of construing amended section 473 literally-the effective abrogation of the discretionary dismissal statutes-would be absurd and intolerable: "[T]he Legislature cannot have intended section 473 to be the perfect escape hatch from the dismissal statutes." (*Graham*, *supra*, 30 Cal.App.4th at p. 1661.) As the court also put it: "If the Legislature had intended to abrogate section 583.410 through its enactment of the amendments to section 473, it would have said so." (*Ibid.*)

Section 473 and its relevant legislative history.

Plaintiff contends that the *Tustin-Graham* analysis errs because it disregards both the plain language of section 473 and its legislative history-not only that of the 1992 amendment to section 473 but also that

of the prior amendment which made relief from default judgments mandatory on a sufficient showing of an attorney's mistake, inadvertence, surprise, or neglect. [FN4] (Stats. 1988, ch. 1131, § 1, p. 3630.) According to plaintiff, the history of these amendments taken together reveals a clear legislative intent, consistent with the express terms of current section 473, to put all dismissed ***1819** plaintiffs-not only those who fail to oppose dismissal motions-on an equal footing with defaulted defendants. We are unpersuaded.

> FN4 Plaintiff characterizes the analysis in *Tustin* and *Graham* as "result-driven," somehow inspired by those courts' "evident fealty to discretionary dismissals." This is wrong. Nothing in *Tustin* or *Graham* reveals an irrational determination to preserve discretionary dismissals at all costs; rather, the courts in those cases applied well-settled canons of statutory construction to the task of attempting to reconcile an apparent conflict between statutes so as to give effect to each.

To the extent plaintiff's argument rests on the literal terms of section 473 standing alone, it fails because we may not consider the statute in isolation, but must harmonize it if possible with the other statutes relating to dismissals, considering the possible consequences of any particular interpretation. (*Dyna-Med, Inc. v. Fair Employment & Housing Com. supra*, 43 Cal.3d at p. 1387.) To the extent plaintiff's argument rests on legislative history, we find nothing in the cognizable history which compels plaintiff's interpretation of the legislative intent underlying the 1992 amendment to section 473. [FN5] Absent compelling grounds in the plain language of the relevant statutes read together or in the legislative history of section 473, we refuse to draw the conclusion urged by plaintiff that the 1992 amendment to section 473 has effectively wiped section 583.410 off the books. Instead, like the *Tustin* majority and the unanimous court in *Graham*, we construe section 473 so as to give effect to the legislative purpose of treating dismissed plaintiffs and defaulted defendants equally, so far as is consistent with the operation of the discretionary dismissal statutes.

> FN5 In successive requests for judicial notice, plaintiff has sought notice of numerous exhibits pertaining to the legislative history of the 1988 and 1992 amendments to section 473. We grant judicial notice as to three of these documents: the report of the Assembly Committee on Judiciary dated May 4, 1992, concerning the proposed 1992 amendment (Assem. Bill No. 3296 (1991-1992 Reg. Sess.), the report of the same committee dated August 9, 1988, concerning the proposed 1988 amendment (Sen. Bill No. 1975 (1987- 1988 Reg. Sess.), and the Legislative Counsel's Digest of the 1988 amendment as passed by the Senate (Aug. 8, 1988). To the extent plaintiff's discussion of legislative history incorporates documents as to which we have denied judicial notice, we disregard it.

The cognizable legislative history of the 1988 and 1992 amendments to section 473 which plaintiff calls to our attention shows the following:

1. The report of the Assembly Committee on Judiciary on the proposed 1988 amendment to section 473 (Sen. Bill No. 1975) explains that under existing law, where relief from default on a showing of mistake, surprise, inadvertence, or neglect was discretionary, trial courts had apparently become reluctant to grant such equitable relief due to increased caseloads. Therefore, in order to protect parties who were defaulted because of "an attorney's indiscretion" rather than any fault of their own, the amendment would make relief mandatory. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1975 (1987-1988 Reg. Sess.) as amended Aug. 1, 1988.)

2. The Legislative Counsel's Digest of Senate Bill No. 1975 as passed by the Senate (Aug. 23, 1988) describes it as effecting a "[s]ubstantial substantive change." ***1820**

3. The report of the Assembly Committee on Judiciary on the proposed 1992 amendment to section 473 states that the bill containing the amendment (Assem. Bill No. 3296) is the committee's omnibus civil practice bill; like its predecessor in the 1991 session, this omnibus bill consolidates "[n]oncontroversial proposals and bills in the area of civil procedure and practice[.]"

(Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3296 (1991- 1992 Reg. Sess.) as amended May 4, 1992.) It explains that as to section 473 the bill "[g]rants plaintiffs mandatory relief if their case is dismissed as a result of their attorney's [*sic*] neglect, mistake, surprise or inadvertence." (*Ibid.*) Finally, it notes: "The State Bar is the source of [this] provision .... The Bar states that it is illogical and arbitrary to allow mandatory relief for defendants when a default judgment has been entered against them due to defense counsel's mistakes and to not provide comparable relief to plaintiffs whose cases are dismissed for the same reason." (*Id.* at p. 2.) The report says nothing about any possible effect of the amendment on the discretionary dismissal statutes.

According to plaintiff, these documents show that the Legislature intended in 1992 to grant across-the-board relief to all dismissed plaintiffs, just as it had done in 1988 for defaulted defendants. We cannot agree.

It is true that, like the 1992 amendment to section 473 itself, the description of that amendment in the 1992 Judiciary Committee report contains no language facially restricting relief to only a subset of dismissed plaintiffs (e.g., those who have failed to oppose a dismissal motion). It is also true, however, that the report terms all changes made by Assembly Bill No. 3296 "noncontroversial." We cannot imagine that the Judiciary Committee would have considered a proposal to abrogate the discretionary dismissal statutes "noncontroversial" if the committee had understood that the proposal would have this effect. Thus it is a reasonable inference that the committee, and by extension the Legislature, did not so understand the proposal.

(4) We note that the State Bar's view of the meaning of proposed legislation, even if it authored that legislation, is not an index of legislative intent. (See *Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 742; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700-702 [170 Cal.Rptr. 817, 621 P.2d 856].)

(2c) But even assuming the State Bar's views are cognizable legislative history, they do not detract from our analysis. Under our reading of amended section 473, a plaintiff seeking relief is granted "comparable" relief to that obtained by a defaulting defendant. Thus, a default judgment is entered when a defendant fails to appear, and, under section 473, relief is afforded where ***1821** the failure to appear is the fault of counsel. Similarly, under our view of the statute, a dismissal may be entered where a plaintiff fails to appear in opposition to a dismissal motion, and relief is afforded where that failure to appear is the fault of counsel. The relief afforded to a dismissed plaintiff by our reading of the statute is therefore comparable to the relief afforded a defaulting defendant.

Furthermore, a long line of authority prior to the 1992 amendment had construed section 473 with respect to dismissals as a provision for relief to plaintiffs who excused their failure to oppose dismissal motions on the ground of mistake, surprise, inadvertence, or neglect, not as a detour around the dismissal statutes. As explained in *Wilcox*, *supra*, an opinion relied on in both *Tustin* and *Graham*: "Section 473 enables a plaintiff who has failed to oppose a motion to dismiss through mistake, inadvertence, surprise or ... neglect to file a belated opposition to such motion. *Section 473 does not provide additional grounds for relief from failure to bring an action to trial within five years. The cases reflect that this has always been the accepted relationship between section 473 and the various statutes permitting dismissal for lack of prosecution.*" (*Wilcox v. Ford*, *supra*, 206 Cal.App.3d at p. 1176, italics added; see also *San Francisco Lathing, Inc.* v. *Superior Court* (1969) 271 Cal.App.2d 78, 82-83 [76 Cal.Rptr. 304]; *Bergloff v. Reynolds* (1960) 181 Cal.App.2d 349, 355 [5 Cal.Rptr. 461]; *Stephens v. Baker & Baker Roofing Co.* (1955) 130 Cal.App.2d 765, 771 [280 P.2d 39]; but see *Martin v. Cook* (1977) 68 Cal.App.3d 799, 810 [137 Cal.Rptr. 434].) Had the Legislature intended to abrogate these holdings, we must presume it would have said so expressly. [FN6] (5) "When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475 [279 Cal.Rptr. 847, 807 P.2d 1076].) [FN7]

FN6 In his reply brief plaintiff calls the language in *Wilcox v. Ford*, *supra*, 206

> Cal.App.3d 1170, as to the dismissal statutes aside from section 583.310 dictum; he also questions its correctness. In addition, he seeks to show that the authorities cited in *Wilcox* on this point do not support *Wilcox*'s conclusion with respect to the discretionary dismissal statutes. Regardless of the merits of these belatedly raised contentions, they do not affect our point that the Legislature is presumed to have been aware of *Wilcox* and the cases cited therein, yet did not expressly reject this line of authority when amending section 473 in 1992.
>
> FN7 "Reenactment" of a statute under this rule of construction may include substantive amendments, as the discussion in *Bouzas* itself makes clear. (*People v. Bouzas*, *supra*, 53 Cal.3d at pp. 470-475.)

(6) Moreover, the repeal or abrogation of statutes by implication is disfavored, as is any construction of a statute which would render related ***1822** statutes a nullity. (*People v. Bouzas*, *supra*, 53 Cal.3d at p. 480; *People v. Craft*, *supra*, 41 Cal.3d at p. 561.) (2d) As we have explained, plaintiff's interpretation of section 473 would in almost all cases render the discretionary dismissal statutes a nullity, since almost every plaintiff whose case was dismissed thereunder could "then jump back into court on a section 473 motion, accompanied by an attorney's affidavit of negligence, and have the case reinstated based on the same facts offered, but discarded, in the hearing on the request to dismiss." (*Tustin Plaza Partnership v. Wehage*, *supra*, 27 Cal.App.4th at p. 1566.) In effect, the discretionary dismissal statutes would be repealed by implication as to all cases where a dismissed plaintiff could obtain such an affidavit. We may not adopt such a construction of section 473 unless compelled to do so. The legislative history cited by plaintiff, which is silent as to the discretionary dismissal statutes, does not compel this construction.

Finally, we note the discretionary dismissal statutes serve important policies. First, these statutes are analogous to statutes of limitation, because they promote the trial of cases before evidence is lost or destroyed or the memory of witnesses becomes dimmed. (*General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 91 [52 Cal.Rptr. 460, 416 P.2d 492].) Second, the discretionary dismissal statutes are designed to expedite the administration of justice by compelling every person who files an action to prosecute it with promptness and diligence. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 332 [216 Cal.Rptr. 718, 703 P.2d 58].) We find nothing in the legislative history of section 473 suggesting the Legislature intended to abandon these important policies.

Additional considerations.

1. *"Exceptions" to the automatic-relief rule.*

Anticipating the above line of analysis, plaintiff seeks to deflect it by showing that his interpretation of section 473 would not have such a far-reaching effect; however, his showing is unpersuasive.

First, plaintiff notes that under the current statute cases are still subject to dismissal where the plaintiff fails to seek relief within six months of entry of judgment or where the motion for relief from dismissal is not "in proper form." However, in our view, this is a minuscule class of cases. In the vast majority of cases dismissed on account of attorney neglect, a section 473 motion would be timely made, under plaintiff's construction of the statute.

Second, plaintiff notes that cases where the plaintiff, rather than counsel, was responsible for the delay in bringing the matter to trial are still excepted ***1823** from relief. However, once again, in our experience, such cases constitute an insignificant percentage of cases dismissed under the discretionary dismissal statutes.

Thus, contrary to plaintiff's view, his interpretation of section 473 would nearly abrogate the discretionary dismissal statutes.

2. *Zellerino v. Brown.*

In his reply brief plaintiff asserts for the first time that this court's holding in *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097 [1 Cal.Rptr.2d 222] compels rejection of the "narrow" construction of section 473 proposed in *Tustin*, *supra*, and *Graham*, *supra*, Because plaintiff failed to make this argument in his opening brief, the contention is

waived. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [265 Cal.Rptr. 788].) In any event, it lacks merit.

In *Zellerino* we had to decide whether a party could obtain relief under section 473 for a default in the discovery phase of a civil action due to "mistake, inadvertence, surprise, or ... neglect," given that the discovery act (§ 2016 et seq.), which "is generally viewed as comprehensive and exclusive" (*Zellerino v. Brown*, *supra*, 235 Cal.App.3d at p. 1104), has its own specified procedures for obtaining relief from default. (See, e.g., §§ 2031, subd. (k), 2034, subd. (k).) In other words, did the specific provisions of the discovery act necessarily prevail over the general provisions of section 473? (235 Cal.App.3d at pp. 1104-1106.) We concluded that relief under section 473 was available to the extent the relief provisions of the discovery act incorporate language similar to that of section 473, but not "when the discovery act provides analogous, if more limited, relief." (235 Cal.App.3d at p. 1107.)

Plaintiff seizes on the following language from *Zellerino*: "To prohibit application of section 473 to discovery matters, [the Legislature] could have expressed in the discovery act that relief under section 473 was unavailable. It did not." (235 Cal.App.3d at p. 1106.) According to plaintiff, this statement constitutes a holding that if the Legislature amends section 473 so as to reach subject matter covered by other statutes and does not expressly exclude them from its scope, section 473 as amended must be deemed to supplant them. We disagree. The quoted statement does not stand for this proposition, which we had no occasion to consider in *Zellerino*. Furthermore, this proposition clashes with the fundamental rule that repeal of statutes by implication is disfavored. (*People v. Bouzas*, *supra*, 53 Cal.3d at p. 480.)

Ultimately, *Zellerino* does not help plaintiff because the analytical problem we faced there differs fundamentally from that we face here. We did not ***1824** hold in *Zellerino* that the discovery act had abrogated section 473 to any extent-merely that the discovery act's provisions for relief, as part of a comprehensive and specific statutory scheme, would apply in the discovery context rather than the more general provisions of section 473 where the discovery act's provisions differed materially. The interrelationship of section 473 and the discretionary dismissal statutes poses no such contrast of generality versus specificity: both on their face apply generally to all actions which have been dismissed for failure to serve a complaint within two years or to bring it to trial within three. Rather, as we have explained, the statutes, if construed literally, conflict because a literal application of section 473 to discretionary dismissals would vitiate section 583.410 et seq., depriving orders of dismissal under that statutory scheme of even the semblance of finality. Our analysis in *Zellerino* does not constitute authority for the proposition that we must resolve a facial conflict between statutes in pari materia by deeming one or the other to be abrogated.

3. *Policy considerations.*

Lastly, plaintiff suggests a number of policy grounds which might have led the Legislature to prefer granting mandatory relief to plaintiffs dismissed under section 583.410 et seq. rather than preserving the discretionary dismissal scheme as it existed before 1992. Because plaintiff does not derive these supposed policy grounds from the cognizable legislative history of the 1992 amendment to section 473, his argument rests on mere speculation. Therefore we need not consider it.

4. *Conclusion.*

We agree with plaintiff that in amending section 473 the Legislature intended in some sense to put dismissed plaintiffs on the same footing with defaulted defendants. However, it is the majority in *Tustin* and the unanimous court in *Graham*, not plaintiff, who have correctly identified the equalization which the Legislature intended: to put plaintiffs whose cases are dismissed for failing to respond to a dismissal motion on the same footing with defendants who are defaulted for failing to respond to an action. (*Graham v. Beers*, *supra*, 30 Cal.App.4th at p. 1661; *Tustin Plaza Partnership v. Wehage*, *supra*, 27 Cal.App.4th at pp. 1565-1566.) [FN8] Only this interpretation of section 473 succeeds in harmonizing it with the discretionary dismissal statutes and avoids the absurd result of abrogating those statutes by implication. ***1825**

FN8 Like plaintiff, we think the trial court

> erred so far as it held the statute applies only to dismissals entered without a hearing. Neither the language of the statute nor authority supports this interpretation; furthermore, it would not effectuate the Legislature's intent as we have described it.

III

In light of our analysis of section 473, plaintiff's contention that he deserved relief thereunder requires only a brief response. As the trial court pointed out, plaintiff's motion for relief merely restated the evidence and arguments offered in opposing dismissal and in seeking reconsideration of the dismissal order; the only new element was the attorney's claim of mistake or neglect and evidence in support thereof. (7) To the extent plaintiff's section 473 motion restated and reargued facts and arguments tendered at the original motion to dismiss, his motion was properly denied because, " 'A motion for relief from [dismissal] may not be used to merely amplify or supplement the evidence and argument[s] that were presented in opposition to the original motion to dismiss. [Citation.]' " (*Graham v. Beers*, *supra*, 30 Cal.App.4th at p. 1660, quoting *Williams v. Los Angeles Unified School Dist.*, *supra*, 23 Cal.App.4th at p. 105 [dictum].) (2e) To the extent plaintiff argued the dismissal had to be set aside, under section 473, because the delay was counsel's fault, for the reasons already stated, such a showing does not state grounds for relief from dismissal under section 583.410.

Disposition

The judgment is affirmed.

Scotland, J., and Brown, J., concurred.

A petition for a rehearing was denied June 13, 1995, and appellant's petition for review by the Supreme Court was denied August 17, 1995. ***1826**

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